14-564 Affirmed

Judge Davis Motion

Submitted

29 Oct. 7

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~393~~ 185

RICHARD GREGG, PLAINTIFF IN ERROR,

vs.

WILLIAM S. MOSS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED DECEMBER 12, 1870

Dec 1871

SUPREME COURT OF THE UNITED STATES.

No. 393.

RICHARD GREGG, PLAINTIFF IN ERROR,

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-room, in the city of Chicago, in the district aforesaid, before the Hon. Thomas Drummond, judge of the circuit court of the United States for the seventh circuit, and the Hon. Henry W. Blodgett, district judge of the United States for said district, judges of said circuit court, on Saturday, the nineteenth day of March, in the adjourned March term of said court, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fourth year.

WILLIAM H. BRADLEY, *Clerk.*

RICHARD GREGG
vs. } 8327.
WILLIAM S. MOSS.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

2 Be it remembered that on the sixteenth day of March, in the year of our Lord one thousand eight hundred and sixty-eight, came Richard Gregg, plaintiff, by Jewett and Jackson, his attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, his præcipe for a writ of summons against William S. Moss, defendant, and also, at the same time, filed his bond for costs in said entitled cause, which said præcipe and bond are respectively in the words and figures following, to wit:

Præcipe.

In the circuit court of the United States for the northern district of Illinois, of the May term, A. D. 1868.

RICHARD GREGG
v. } Assumpsit, damages, $25,000.
WILLIAM S. MOSS, PEORIA, ILL'S.

The clerk will please issue summons as above to the marshal of the northern district of Illinois.

JEWETT & JACKSON,
Plaintiff's Attorneys.

3 (Endorsed:) Filed March 16, 1868. W'm H. Bradley, cl'k.

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, April term, A. D. 1868.

RICHARD GREGG
vs. } In common law.
WILLIAM S. MOSS.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, hereby agree and

stipulate that execution may issue against my property for any costs taxed against .

Dated this 16th day of March, A. D. 1868.

OBADIAH JACKSON.

(Endorsed:) Filed March 16th, A. D. 1868. W'm H. Bradley, clerk.

On the same day, to wit, the 16th day of March, A. D. 1868, a
4 writ of summons issued out of said clerk's office against said defendant in said entitled cause, which said summons, together with the return of the marshal thereon, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, northern district of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you that you summon William S. Moss, if he shall be found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, at the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of May next, to answer unto Richard Gregg in a plea of trespass on the case upon promises, to his damage, as he alleges, of twenty-five thousand dollars, and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Su-
5 preme Court of the United States of America, at Chicago aforesaid, this 16th day of March, in the year of our Lord one thousand eight hundred and sixty-eight, and of our independence the 92nd year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

Executed this writ by reading to the within-named William S. Moss this 24th day of March, A. D. 1868.

J. R. JONES, *U. S. Marshal.*
By P. MUNSON, *Deputy.*

(Endorsed:) Filed May 4th, A. D. 1868. W'm H. Bradley, clerk.

On this day, to wit, the 24th day of April, A. D. 1868, came said plaintiff by his attorneys, and filed in said clerk's office his declaration against said defendant in said entitled cause, which said declaration is in the words and figures following, to wit:

Declaration.

Circuit court of the United States for the circuit and northern
6 district of Illinois, ss., of the May term, A. D. 1868.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Richard Gregg, who is a citizen and resident of the State of Illinois, plaintiff in this suit, by Jewett & Jackson, his attorneys, complains of

William S. Moss, who is citizen of the State of California, and resident of said State of California, defendant, in a plea of trespass on the case on promises.

For that whereas heretofore, to wit, on the first day of March, in the year of our Lord one thousand eight hundred and fifty-seven, at Peoria, to wit, at said district, the said defendant and one William Kellogg, then in life but now deceased and whom the said defendant hath survived, were indebted to the said plaintiff in the sum of twenty-five thousand dollars, for so much money before that time lent and advanced by the said plaintiff to the said defendant and William Kellogg, at
7 their special instance and request. And for other money before that time by the said plaintiff paid, laid out, and expended for the said defendant and said William Kellogg, and at the like request of the said defendant and said William Kellogg; and for other money before that time, by the said defendant and said William Kellogg had and received, to and for the use of the said plaintiff; and for other money before that time, and then, due and owing to said plaintiff for interest upon and for the forbearance of divers other sums of money before that time, and then, due and owing from the said defendant, and said William Kellogg to said plaintiff; and being so indebted, the said defendant and William Kellogg in consideration thereof afterwards, and in the life-time of the said William Kellogg, to wit, on the same day and year, and at the place aforesaid undertook and promised the plaintiff to pay unto the said plaintiff the said several sums of money in this count
8 mentioned, when the said defendant and William Kellogg should be thereunto afterwards requested, yet the said defendant and William Kellogg in the life-time of said William Kellogg, and the said defendant since the death of the said William Kellogg, not regarding the said several promises so made by them as aforesaid, have not nor hath either of them as yet paid the said several sums of money or any or either of them, or any part thereof to the said plaintiff (although often requested so to do,) but to pay the same or any part thereof to the said plaintiff, the said defendant, and William Kellogg, in the life-time of William Kellogg, wholly refused, and the said defendant hath ever since the death of the said William Kellogg wholly refused and still refuses so to do.

And whereas also the said defendant and William Kellogg afterwards and in the life-time of the said William Kellogg, now deceased, to wit, on the day and year aforesaid, at Peoria, to wit, at the district aforesaid, were indebted to the plaintiff in the further sum of twenty-five thousand dollars for so much money before that time by the said plaintiff lent and advanced to the said defendant and William
9 Kellogg, at their special instance and request, and also in the further sum of twenty-five thousand dollars then due and owing to the plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant and William Kellogg to the said plaintiff, and being so indebted and the said several sums of money in this count mentioned being and remaining wholly due and owing, unpaid, and unsatisfied, he, the said defendant in consideration thereof afterwards and after the death of the said William Kellogg, to wit, on the twenty-third day of March, A. D. 1868, at Peoria, to wit, at the district aforesaid, undertook and then and there promised the plaintiff to pay him the said sum of money in this count mentioned, when he the said defendant should be thereunto afterwards requested, &c.

And whereas also the said defendant afterwards, to wit, on the first day of March, in the year of our Lord one thousand eight hundred and sixty-eight, to wit, at the district aforesaid became and was
10 indebted to the said plaintiff in a large sum of money, to wit, the sum of twenty-five thousand dollars of lawful money for the work and labor, care and diligence, attention and attendance of the said plaintiff by the said plaintiff before that time done, performed, bestowed and given in and about the goods, chattels, wares, machinery, property, premises, possessions, and business of said defendant, and for the said defendant and at the special instance and request of said defendant, and also for divers materials and other necessary things by the said plaintiff, before that time found, furnished, provided, used and applied in and about that work and labor for the said defendant at the like special instance and request of said defendant, and being so indebted to the said plaintiff, the said defendant in consideration thereof afterwards, to wit, on the same day and year, and at the place aforesaid undertook and then and there faithfully promised the said plaintiff well and truly to pay to said plaintiff said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

11 And whereas also afterwards, to wit, on the same day and year and at the place aforesaid, in consideration that the said plaintiff had before that time, done, performed, bestowed, and given other work and labor, care, and diligence, attention and attendance of the said plaintiff in and about the goods, chattels, wares, machinery, property, possessions, and business of the said defendant, at the request of said defendant, and had also at the like special instance and request of said defendant before that time found, furnished, provided, used, and applied divers other materials and necessary things in and about the said last-mentioned work and labor of the said plaintiff, the said defendant undertook and then and there faithfully promised the said plaintiff well and truly to pay to the said plaintiff so much money as the last aforesaid work and labor and materials of said plaintiff at the time aforesaid were reasonably worth when said defendant should be thereunto afterwards requested, and the said plaintiff aver' that the same at said time were reasonably worth the further large sum of twenty-five thousaud dollars, in like lawful money, at the time and place
12 aforesaid, whereof the said defendant afterwards, to wit, at the time and place aforesaid had notice.

And whereas also the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, become and was indebted to the said plaintiff in a large sum of money, to wit, the sum of twenty-five thousand dollars, of lawful money, for divers goods, wares, and merchandise, by the said plaintiff before that time sold and delivered to the said, and at the special instance and request of the said, defendant, and being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay to the said plaintiff the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

And whereas also afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had
13 before that time at the like special instance and request of the said defendant, sold and delivered to the said defendant divers

other goods, wares, and merchandise of the said plaintiff, the said defendant then and there undertook and faithfully promised to said plaintiff that the said defendant would well and truly pay to said plaintiff so much money as the last aforesaid goods, wares, and merchandise at the time of the sale and delivery thereof were reasonably worth, when the said defendant should be thereunto afterwards requested; and the said plaintiff aver' that the said goods, wares, and merchandise last mentioned at the time of the sale and delivery thereof, were reasonably worth the further large sum of money, to wit, the sum of twenty-five thousand dollars of like lawful money aforesaid, to wit, at the place aforesaid, whereof the said defendant afterwards, on the same day and year, at the place aforesaid, had notice.

And whereas also the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, was indebted to the said plaint-
14 iff in the further large sum of money, to wit, the sum of twenty-five thousand dollars of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendant, and at the like request of the said defendant, and for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant, and at the like request of the said defendant, and for other money by the said defendant before that time had and received to and for the use of the said plaintiff, and for other money before that time, and then, due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time, and then, due and owing from said defendant to said plaintiff, and being so indebted, the said defendant in consideration thereof afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said several sums of money in this count mentioned, when the said defendant should be thereunto afterwards requested.

15 And whereas also the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid, and upon such accounting, the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further large sum of money, to wit, the sum of twenty-five thousand dollars of like lawful money as aforesaid; and being so found in arrear and indebted to the said plaintiff, the said defendant in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant, (although often requested,
16 etc.,) has not yet paid the several said sums of money above mentioned, or any or either of them or any part thereof to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused and still does refuse, to the damage of said plaintiff of twenty-five thousand dollars, and therefore the said plaintiff brings suit, etc.

JEWETT & JACKSON,
Plaintiff's Attorneys.

Copy of instrument and accounts sued on.

William S. Moss, survivor of William Kellogg, to Richard Gregg, Dr.

Dec. 23, 1856.	To money loaned	$10,000
March 1, 1868.	Interest on same to date	6,720
		$16,720

To money	paid, laid out & expended	$25,000
" "	had and received to & for the use of the plaintiff.	$25,000
" "	loaned	$25,000
" "	advanced on ac. of pl'ff	$25,000
"	interest on money loaned	$25,000

(Endorsed:) Filed this 24th day of April, 1868. W'm H. Bradley, clerk.

17 On this day, to wit, the 12th day of May, A. D. 1868, came said defendant by his attorneys, and filed in said clerk's office his pleas in said entitled cause, which said pleas are in the words and figures following, to wit:

Pleas.

United States circuit court, northern district of Illinois. May term, 1868

RICHARD GREGG
vs.
WILLIAM S. MOSS.

And the said defendant comes and defends the wrong & injury when, &c., and says he did not assume and promise in manner and form as the said plaintiff in his said declaration hath alleged, and of this he puts himself upon the country for trial.

By his att'y, JOHNSON & HOPKINS.
PETERS.

And for further plea in this behalf the said def't says action non, because he says the said supposed causes of action in the plaintiff's said declaration mentioned did not accrue within five years next preceding
18 the commencement of the said suit, and this the said defendant is ready to verify, wherefore he prays judgment, &c.

By his att'ys, JOHNSON, HOPKINS & PETERS.

(Endorsed:) Filed May 12th, 1868. W'm H. Bradley, cl'k.

On this day, to wit, the 1st day of June, A. D. 1868, came said plaintiff by his attorneys, and filed in said clerk's office his replications in said entitled cause, which said replications are in the words and figures following, to wit:

Replication.

In the circuit court of the United States for the northern district of Illinois.

RICHARD GREGG
v.
WILLIAM S. MOSS.

And the said plaintiff, as to the said plea of the said defendant, by

him firstly above pleaded, whereof he puts himself upon the country, doth the like.

19 And the said plaintiff, as to the said plea of the said defendant, by him secondly above pleaded, saith precludi non, because he saith that the said several causes of action in the said declaration mentioned, and each and every of them, did accrue to the said plaintiff within five years next preceding the commencement of this suit in manner & form as the said plaintiff hath above complained against the said defendant, to wit, at the district aforesaid. And this the plaintiff prays may be enquired of by the country, &c.

& the def't doth the like.

PETERS & HARDING, *for Def't.*

And for a further replication to the said plea of the said defendant, by him secondly above pleaded, the said plaintiff, by like leave of court, &c., says precludi non, because he says that after such causes of action accrued to him, to wit, on the first day of May, A. D. 1861, he, the said defendant, did depart from this State and did reside in another

20 State from that time for the space of, to wit, seven years next thereafter, when he first returned to this State, and hath ever since resided therein, and that the said plaintiff commenced his suit within five years next after the said disability was removed. And this the said plaintiff is ready to verify; wherefore he prays judgment and his damages by him sustained on occasion of the said several promises and undertakings in the said declaration mentioned to be adjudged to him, &c.

JEWETT & JACKSON,
Plaintiff's Attorneys.

And for a further replication the plaintiff, by leave of court, says precludi non, because he says that the said several promises in said declaration mentioned were in writing & signed by the said William S. Moss & William Kellogg, & this he is ready to verify; wherefore he prays judgment, &c.

By JACKSON, *his Attorney.*

(Endorsed:) Filed June 1st, 1868. W'm H. Bradley, cl'k.

21 On this day, to wit, the 1st day of June, A. D. 1868, came said defendant by his attorneys, and filed in said clerk's office his demurrer in said entitled cause, which said demurrer is in the words and figures following, to wit:

Demurrer.

U. S. circuit court, northern district of Ill's.

RICHARD GREGG }
vs.
WILLIAM S. MOSS. }

And the said def't comes & says that pl't'ff's 2d replication to def't's plea of the the statute of limitations is insufficient in law; wherefore the said def't prays judgment, &c.

PETERS & HARDING,
Att'ys for Def't.

(Endorsed:) Filed June 1st, 1868. W'm H. Bradley, cl'k.

Copy of instrument and accounts sued on.

William S. Moss, survivor of William Kellogg, to Richard Gregg, Dr.

Dec. 23, 1856.	To money loaned	$10,000
March 1, 1868.	Interest on same to date	6,720
		$16,720

To money	paid, laid out & expended	$25,000
" "	had and received to & for the use of the plaintiff.	$25,000
" "	loaned	$25,000
" "	advanced on ac. of pl'ff	$25,000
"	interest on money loaned	$25,000

(Endorsed:) Filed this 24th day of April, 1868. W'm H. Bradley, clerk.

17 On this day, to wit, the 12th day of May, A. D. 1868, came said defendant by his attorneys, and filed in said clerk's office his pleas in said entitled cause, which said pleas are in the words and figures following, to wit:

Pleas.

United States circuit court, northern district of Illinois. May term, 1868

RICHARD GREGG
vs.
WILLIAM S. MOSS.

And the said defendant comes and defends the wrong & injury when, &c., and says he did not assume and promise in manner and form as the said plaintiff in his said declaration hath alleged, and of this he puts himself upon the country for trial.

By his att'y, JOHNSON & HOPKINS.
PETERS.

And for further plea in this behalf the said def't says actio non, because he says the said supposed causes of action in the plaintiff's said declaration mentioned did not accrue within five years next preceding
18 the commencement of the said suit, and this the said defendant is ready to verify, wherefore he prays judgment, &c.

By his att'ys, JOHNSON, HOPKINS & PETERS.

(Endorsed:) Filed May 12th, 1868. W'm H. Bradley, cl'k.

On this day, to wit, the 1st day of June, A. D. 1868, came said plaintiff by his attorneys, and filed in said clerk's office his replications in said entitled cause, which said replications are in the words and figures following, to wit:

Replication.

In the circuit court of the United States for the northern district of Illinois.

RICHARD GREGG
v.
WILLIAM S. MOSS.

And the said plaintiff, as to the said plea of the said defendant, by

him firstly above pleaded, whereof he puts himself upon the country, doth the like.

19 And the said plaintiff, as to the said plea of the said defendant, by him secondly above pleaded, saith precludi non, because he saith that the said several causes of action in the said declaration mentioned, and each and every of them, did accrue to the said plaintiff within five years next preceding the commencement of this suit in manner & form as the said plaintiff hath above complained against the said defendant, to wit, at the district aforesaid. And this the plaintiff prays may be enquired of by the country, &c.

& the def't doth the like.

PETERS & HARDING, *for Def't.*

And for a further replication to the said plea of the said defendant, by him secondly above pleaded, the said plaintiff, by like leave of court, &c., says precludi non, because he says that after such causes of action accrued to him, to wit, on the first day of May, A. D. 1861, he, the said defendant, did depart from this State and did reside in another

20 State from that time for the space of, to wit, seven years next thereafter, when he first returned to this State, and hath ever since resided therein, and that the said plaintiff commenced his suit within five years next after the said disability was removed. And this the said plaintiff is ready to verify; wherefore he prays judgment and his damages by him sustained on occasion of the said several promises and undertakings in the said declaration mentioned to be adjudged to him, &c.

JEWETT & JACKSON,
Plaintiff's Attorneys.

And for a further replication the plaintiff, by leave of court, says precludi non, because he says that the said several promises in said declaration mentioned were in writing & signed by the said William S. Moss & William Kellogg, & this he is ready to verify; wherefore he prays judgment, &c.

By JACKSON, *his Attorney.*

(Endorsed:) Filed June 1st, 1868. W'm H. Bradley, cl'k.

21 On this day, to wit, the 1st day of June, A. D. 1868, came said defendant by his attorneys, and filed in said clerk's office his demurrer in said entitled cause, which said demurrer is in the words and figures following, to wit:

Demurrer.

U. S. circuit court, northern district of Ill's.

RICHARD GREGG
vs.
WILLIAM S. MOSS.

And the said def't comes & says that pl't'ff's 2d replication to def't's plea of the the statute of limitations is insufficient in law; wherefore the said def't prays judgment, &c.

PETERS & HARDING,
Att'ys for Def't.

(Endorsed:) Filed June 1st, 1868. W'm H. Bradley, cl'k.

On this day, to wit, the 29th day of October, A. D. 1868, came said defendant, by his attorneys, and filed in said clerk's office his re-
22 joinder in said entitled cause, which said rejoinder is in the words and figures following, to wit,

Rejoinder.

U. S. cir. court.

GREGG } *vs.* MOSS. }

And the said def't says by way of rejoinder that the defendant had been within the State of Illinois five years after the maturing of the cause of action and before the commencement of this action, and of this the def't puts himself upon the country.

And plaintiff doth the like.

WEED & JACKSON,
Att'ys for Pl'ff.

And by way of rejoinder to pl't'ff's 2d replication to def't's 2d plea the said def't says that the causes of action declared upon were not in writing, as alleged in said replication, and of this the def't puts himself upon the country.

PETERS, HARDING & JOHNSON,
Def't's Att'ys.

And pl'ff doth the like.

WEED & JACKSON,
Att'ys for Pl'ff.

(Endorsed;) Filed Oct. 29th, 1868. W'm H. Bradley, cl'k.

23 On this day, to wit, the 29th day of October, in the adjourned October term, A. D. 1868, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

1st trial.

RICHARD GREGG } *vs.* WILLIAM S. MOSS. } Assumpsit.

Now come the parties by their attorneys, and now comes on to be heard the demurrer of the defendant to the replication of the plaintiff, filed herein, and, after the arguments of counsel, the court sustain' said demurrer, with leave to the plaintiff to amend his replication; and, upon issue joined thereupon, come a jury of good and lawful men, to wit, George Pope, Perry Marshall, J. L. Kerlin, Edwin W. Hine, Ebenezer Barry, A. S. White, G. A. Hamilton, Elhanan Fisher, Henry Cherry, L. H. Rawson, James Hatch, and G. S. Gilbert, who were all duly elected, tried, and sworn well and truly to try said issue; and, after hearing the evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

24 On this day, to wit, the 30th day of October, in the adjourned October term, A. D. 1868, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

Verdict (1st) & motion for new trial.

RICHARD GREGG
vs.
WILLIAM S. MOSS. } Assumpsit.

Now come again the parties by their attorneys, and now come also the jury in this behalf empanneled and sworn, and, after hearing the concluding arguments of counsel, and receiving the instructions of the court, the jury retire to consider of their verdict, and, after a short absence, the jury returned into court the following verdict, to wit:

We, the jury, find the issue for the plaintiff, and assess his damages to the sum of seventeen thousand one hundred and twelve dollars and eighty-eight cents.

And thereupon the defendant, by his attorney, moves the court for a new trial herein.

25 On this day, to wit, the 19th day of December, in the adjourned October term, A. D. 1868, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

Motion heard.

RICHARD GREGG
vs.
WILLIAM S. MOSS.

Now come the parties by their attorneys, and now comes on to be heard the motion of the defendant heretofore entered herein for a new trial of this cause, and, after hearing the arguments of counsel, the court takes the same under advisement.

On this day, to wit, the 4th day of January, A. D. 1869, in December term, A. D. 1868, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

New trial granted.

RICHARD GREGG
vs.
WILLIAM S. MOSS.

26 The court, having considered and being now fully advised upon the motion of the defendant heretofore entered for a new trial of this cause, sustains said motion, and grants a new trial upon the payment, by the defendant, of all the taxed costs herein within thirty days.

On this day, to wit, the second day of April, in the adjourned March term, A. D. 1869, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

2d trial.

RICHARD GREGG
vs.
WILLIAM S. MOSS. } Assumpsit.

Now come the parties by their attorneys, and, upon issue joined thereupon, come a jury of good and lawful men, to wit, William P. White, Charles A. S. Henry, George Fields, J. R. Walker, W. W. Thomas, Nathan Yarnell, John G. Mitchell, Alexander White, William Lum, William Johnston, Thomas Armstrong, and T. C. Janes, who were all duly elected, tried, and sworn well and truly to try said issue, and, after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

27 Afterwards, to wit, on the 3d day of April, in the adjourned March term, A. D. 1869, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

RICHARD GREGG
vs.
WILLIAM S. MOSS. } Assumpsit.

Now come again the parties by their attorneys, and now come also the jury in this behalf empanneled and sworn, and, after hearing additional evidence until the hour of adjournment, without concluding the same, the further trial of the cause is postponed until Monday morning next.

Afterwards, to wit, on the 5th day of April, in the adjourned March term, A. D. 1869, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

RICHARD GREGG
vs.
WILLIAM S. MOSS. } Assumpsit.

28 Now come again the parties by their attorneys, and now come also the jury in this behalf empanneled and sworn, and, after hearing the concluding evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

On this day, to wit, the 6th day of April, in said March term, A. D. 1869, of said court, in the record of the proceedings thereof in said-entitled cause is the following entry, to wit:

RICHARD GREGG
vs.
WILLIAM S. MOSS. } Assumpsit.

Now come again the parties by their attorneys, and now come also the jury in this behalf empanneled and sworn, and, after hearing a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

29 Afterwards, to wit, on the 7th day of April, in said March term, A. D. 1869, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

Leave to seal verdict.

RICHARD GREGG *vs.* WILLIAM S. MOSS. } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empanneled and sworn; and, after hearing the concluding arguments of counsel, and receiving the instructions of the court, the jury retired to consider of their verdict. And by agreement of the parties, by their attorneys, the jury, when they shall have agreed upon a verdict, may sign and seal the same, and deliver it to the clerk and disperse.

On this day, to wit, the 8th day of April, in said March term, A. D. 1869, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

30 *Jury discharged.*

RICHARD GREGG *vs.* WILLIAM S. MOSS. } Assumpsit.

The jury in this behalf empanneled and sworn this day, returned into court and reported that they had been unable to agree upon a verdict, and, with the consent of the parties, by their attorneys, it is ordered that they be discharged from the further consideration of the cause.

On this day, to wit, the 3d day of June, in the adjourned May term, A. D. 1869, of said court, in the record of the same in said entitled cause, is the following entry, to wit:

3d trial.

RICHARD CREGG *vs.* WILLIAM S. MOSS. } Assumpsit.

Now come the parties, by their attorneys, and upon issue joined thereupon, come a jury of good and lawful men, to wit, Moses W. Gleason, Henry G. Gable, John C. Garner, James Bennett, George W.
31 Downs, John Kennedy, M. M. Thompson, James Springer, Joseph F. Garcia, Charles F. Durston, John Yourt, and Alfred E. Hale, who were all duly elected, tried, and sworn, well and truly to try said issue; and, after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

On this day, to wit, the 4th day of June, in said May term, A. D. 1869, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

RICHARD GREGG
vs.
WILLIAM S. MOSS. } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empanneled and sworn; and, after hearing additional evidence until the hour of adjournment without concluding the same, the further trial is postponed until to-morrow morning.

32 On this day, to wit, the 5th day of June, in said May term, A. D. 1869, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

RICHARD GREGG
vs.
WILLIAM S. MOSS. } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empanneled and sworn; and, after hearing additional evidence until the hour of adjournment without concluding the same, the further trial of the cause is postponed until Monday morning next.

On this day, to wit, the 7th day of June, in said May term, A. D. 1869, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

RICHARD GREGG
vs.
WILLIAM S. MOSS. } Assumpsit.

33 Now come again the parties, by their attorneys, and now come also the jury in this behalf empanneled and sworn; and, after hearing the concluding evidence, and a part of argument of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to morrow morning.

On this day, to wit, the 8th day of June, in said May term, A. D. 1869, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

Verdict (2d) & motion for new trial.

RICHARD GREGG
vs.
WILLIAM S. MOSS. } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empanneled and sworn; and, after hearing the concluding arguments of counsel, and receiving the instructions of the court the jury retired to consider of their verdict; and, after a short absence, the jury returned into court the following verdict, to wit:

34 We, the jury, find the issue for the plaintiff, and assess his damages to the sum of seventeen thousand three hundred and fifty dollars.

And thereupon the defendant, by his attorney, moves the court for a new trial herein.

On this day, to wit, the 30th day of June, in said May term, A. D. 1869, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

Motion heard.

RICHARD GREGG
vs.
WILLIAM S. MOSS. } Assumpsit.

Now come the parties, by their attorneys, and now comes on to be heard the motion of the defendant heretofore entered herein for a new trial of this cause, and, after hearing the arguments of counsel, the court takes the same under advisement.

On this day, to wit, the 2d day of July, in the May term, A. D. 1869, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

35 *New trial granted.*

RICHARD GREGG
vs.
WILLIAM S. MOSS. } Assumpsit.

The court, having considered, and being now fully advised upon the motion of the defendant heretofore entered herein, for a new trial of this cause, sustains said motion, and grants a new trial upon the payment, by the defendant, of all the taxed costs herein, and also a counsel ee of one thousand dollars, within thirty days.

On this day, to wit, the 10th day of February, A. D. 1870, in the December term, A. D. 1869, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

4th trial.

RICHARD GREGG
vs.
WILLIAM S. MOSS. } Assumpsit.

Now come the parties, by their attorneys, and, upon issue joined thereupon, come a jury of good and lawful men, to wit: C. W. Smith,
R. J. Rickey, Samuel Dihel, Henry Hazlehurst, W. Moore, W.
36 W. Huntington, Robert Meeder, William Coe, A. W. Streeter,
W. R. Arey, Patrick Connelly, and Benjamin Robertson, who were all duly elected, tried, and sworn well and truly to try said issue; and, after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until tomorrow morning.

On this day, to wit, the 11th day of February, A. D. 1870, in the December term, A. D. 1869, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

RICHARD GREGG
vs.
WILLIAM S. MOSS. } Assumpsit.

Now come again the parties, by their attorneys, and now come, also, the jury in this behalf empan'eled and sworn; and, after hearing additional evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

37 On this day, to wit, the 12th day of February, A. D. 1870, in the December term, A. D. 1869, of said court, in the record of the proceedings thereof in said-entitled cause, is the following entry, to wit:

RICHARD GREGG
vs.
WILLIAM S. MOSS. } Assumpsit.

Now come again the parties, by their attorneys, and now come, also, the jury in this behalf empanneled and sworn; and, after hearing the concluding evidence, the hour of adjournment having arrived, the further trial of the cause, is postponed until Monday morning next.

On this day, to wit, the 14th day of February, A. D. 1870, in the December term, A. D. 1869, of said court, in the record of the proceedings thereof in said-entitled cause, is the following entry, to wit:

Leave to seal verdict.

RICHARD GREGG
vs.
WILLIAM S. MOSS. } Assumpsit.

38 Now come again the parties, by their attorneys, and now come, also, the jury in this behalf empanneled and sworn; and, after hearing the arguments of counsel and receiving the instructions of the court, the jury retired to consider of their verdict. And, by agreement of the parties by their attorneys, the jury, when they shall have agreed upon a verdict, may sign and seal the same, and deliver it to the clerk, and disperse.

On this day, to wit, the 15th day of February, A. D. 1870, in the December term, A. D. 1869, of said court, in the record of the proceedings thereof in said-entitled cause, is the following entry, to wit:

Verdict for def't, & motion for new trial.

RICHARD GREGG
vs.
WILLIAM S. MOSS. } Assumpsit.

The jury in this behalf empanneled and sworn this day returned into court their sealed verdict, wherein they say—We, the jury, find the issue for the defendant.

And thereupon the plaintiff, by his attorney, moves the court for a new trial herein.

39 On this day, to wit, the 19th day of March, A. D. 1870, in the adjourned March term of said court in said year, in the record of the proceedings of said court in said-entitled cause, is the following entry, to wit:

Motion overruled, & judgment for def't.

RICHARD GREGG
vs.
WILLIAM S. MOSS. } Assumpsit.

Now come the parties, by their attorneys, and the motion of the plaintiff, heretofore entered herein for a new trial of this cause, coming on to be heard, and the plaintiff, by his attorneys, failing to urge his said motion, the same is overruled by the court. It is thereupon considered and adjudged by the court that the defendant do have and recover of the plaintiff his costs and charges by him about his defence in this behalf expended, amounting to the sum of forty dollars and ninety-five cents, and that he have execution therefor.

On the hearing of said cause the following exceptions were taken and were allowed, and are in the words and figures following, viz:

40 BILL OF EXCEPTIONS.

In the circuit court of the United States for the northern district of Illinois.

RICHARD GREGG
vs.
WILLIAM S. MOSS. } Bill of exceptions.

Be it remembered that this cause came on for trial on the 10th day of February, A. D. 1870, that being one of the days of the December term, A. D. 1869, of said court, before the Hon. H. W. Blodgett, judge, and a jury; whereupon the plaintiff, in order to sustain the issue on his part, introduced the following testimony.

The plaintiff introduced in evidence the following letter:

Letter from Kellogg and Moss.

PEORIA, *Dec. 23rd*, 1856.

RICH'D GREGG, Esq'r.

DEAR SIR: Mr. Elder is here, & wants to take the funds with him to pay drafts due to-morrow. It is not right that he should be forced to pay this money for our accommodation. If you will send us two drafts @ 60 days, 5,000 each, we will return you the money before the expiration of the 60 days. It must be done, as we cannot get along any other way.

Mr. E. wishes to leave in the cars.

41 Yours, truly,

W'M KELLOGG.
W'M S. MOSS.

Testimony of Rich'd Gregg.

The plaintiff, RICHARD GREGG, having been duly sworn, testified as follows:

I have seen that letter before. Know the signatures of Moss & Kel-

logg. The names signed to it are those of Moss & Kellogg in their own handwriting. The body of the letter is in Kellogg's handwriting. Mr. Kellogg brought me that letter on the morning of its date, 23rd of Dec., 1856. I was driving out to my distillery, about half a mile below Peoria, and met Mr. Kellogg about 9 o'clock a. m. He hailed me, and told me that Mr. Elder was here, and what he was here for. Mr. Elder had been accepting drafts for Kellogg, Moss & Co., and the drafts were about falling due, and Mr. Kellogg desired to be placed in funds to take up the drafts due next day. He told me that he could raise no money; that Capt. Moss could do nothing for him, and that I must. I told him that I was hard up at that time of the year; it was the closing of navigation, in December; that I was distilling, and could not spare
42 the money; that I had already crippled myself. I passed on down to my distillery. About 11 o'clock Mr. Kellogg and another gentleman drove into the yard. I don't remember who was with him. Mr. Kellogg came in and presented that letter, and upon that letter and entreaties I gave him—as I recollect now—it is a long time ago, and my books have been destroyed by a fire which burned up my distillery, (my distillery burned up twice, office and papers all burned up,)—a package of currency of $5,000, and local paper to the amount of $5,000. I either gave him a draft of my own, or accepted his draft 30 or 40 days. It was Peoria paper of some kind. I am pretty positive about the currency. I took up the local paper afterwards. I advanced $10,000 to Mr. Kellogg that day on that letter. Mr. Kellogg told me in the morning, and also when he came into my office, what he wished to do. This has never been paid—not a cent of it. I had a conversation with W'm S. Moss, before the death of Mr. Kellogg, in regard to this matter. I asked him to pay me the money, or get me the money. Afterwards Mr. Moss said that he went to see Mr. Kellogg to get this money back
43 for me, and Kellogg told him that my money was no better than his. That was during the year 1857. I spoke to Moss on several occasions during 1857 to get me this money back. I needed it in my business.

Cross-examination:

Jos. E. Elder was a commission merchant, living in St. Louis. Mr. Kellogg told me, on the morning of the date of that letter, that Elder was in Peoria to get some funds to pay drafts due the next day, or within a day or two, at St. Louis—drafts due from Kellogg, Moss & Co., a firm that was building a railroad from Peoria to Galesburg.

(Letter offered and received in evidence.)

The members of the firm of Kellogg, Moss & Co., at the date of the letter, were W'm S. Moss, W'm Kellogg, Cha's Clark, Hervey Lightner, James Knox, and myself. Mr. Knox lived at Knoxville. He was reported to be a man of considerable means. Clark was comfortably off. Lightner was tolerably well off. They were all three perfectly solvent. I was distilling at Peoria at the date of the letter, 23d Dec., 1856. I needed money for carrying on the business of the distillery, buy-
44 ing grain, hogs, &c., and paying for labor. I was receiving and paying out money both every day; was investing more than getting returns. I saw Mr. Kellogg in the morning, and told him I was hard up for money. I had already advanced more than I had agreed to. I was tolerably hard up. I was so hard up that I needed the money in my business. I could use it to advantage in my business. I handed over to Kellogg a package of $5,000 in currency. I don't know where the money came from. I was getting money from several parties at

that time—from Mr. Ewing, Mr. Fink, my father, & from Indiana. I was getting both by way of advancement and as loans; don't know which this was. It was one or the other, or I might have got a package from one of the banks in Peoria. I got the money originally to use in my business. It was in my office. I expected to use it that day, or sometime during the week. I did not leave a large amount of money in my office nights and days, as a general thing; didn't very often get a $5,000 package; can't tell what I intended to do with it that day; had it for some purpose, though. I met Kellogg up town, and
45 afterwards he came to my office with the letter at about 11 o'clock. I read the letter. I said that, in consequence of the letter, and in consequence of some entreaties that Kellogg made, I let him have the money. He would not have got it unless I had that special guaranty of the letter. I advanced the money solely on the letter, because he had asked me for it in the morning, and I refused. I read the letter clear through. One-half of the money was in currency—$5,000; the other half was in local paper of some kind; I don't remember what. That is my recollection about it. I mean by local paper, paper payable at Peoria. I have no recollection what paper; don't remember whether it was a draft that he drew upon me. I know my name must have been upon the paper in some shape; don't remember that it was. I don't see how I could give local paper unless my name was on it. I know that it was paper that I gave of some shape, though I have no idea what it was. I know the money was raised in my name; don't remember whether it was a check on a bank or not. I may have said that
46 it was a check on a bank; am not certain. I guess I did on the first trial. I can't find the checks since. I thought on the former that it was checks on the Peoria Bank. I knew it was local paper of some kind. That was my recollection then. I can't find the checks. I have hunted in the banks, and infer from that that I was mistaken. My recollection of the transaction is not at all different now from what it was then. I remember it was local paper of some kind. A check is local paper. I thought it was, at first, a check on the bank. I have changed my mind on that subject, because I have gone to the banks & can't find the checks. I have not found the paper that I did give. I have looked for it. I have not changed my mind about the remembrance of giving local paper. The checks would not be as likely to get lost as the other paper, because the banks keep a memorandum of them. I have no record of any other paper, because my books were burned up. I do not recollect how many pieces of local paper I gave, nor when it was payable; whether it was checks on banks or drafts. I have only a general recollection that it was local paper.
47 I remember that I gave something of the kind but don't remember what it was; I get at the amount from memory. I know that I gave him $10,000, and my remembrance is that I gave him $5,000 in currency, that would leave $5,000; I am very positive that I gave him $5,000 in currency. I swear to that; all I do remember about the paper is the amount, except that it was local paper of some kind. Moss in his letter requests me to give two drafts at 60 days, $5,000 each; that would be 60 days from the 23rd of Dec. It would not have taken any money to give these drafts; it is easy enough to give a draft, but I did not know whether it would be paid or not; I had nobody to draw on. I understood that I must have somebody to draw on in order to give my draft. I guess that was the only reason I did not give my draft. I could have drawn drafts to pay grain, or stock, or anything of that kind, but not to put in the railroad. I had no authority to do that; I could have

given my paper payable in 60 days to the order of W'm S. Moss or Moss & Kellogg; that would have held me; I could have done that if
48 it had been proposed to me in that shape; I had no parties to draw on and did the next best thing I could to meet their wants. I happened to have the money. I was using money all the time. I used that much less. I had that much to spare. I could have used it to advantage by buying corn at low prices as we always do in winter. I could have made more money in that way than by loaning money to the railroad. My custom was to buy corn in the winter to run me through the spring planting of the farmers. I always buy a large amount of grain in the winter. I was needing a great deal of money to use in my business. I had made arrangements to get money in the winter for that purpose, with different parties; I gave local paper but didn't expect to take it up; Mr. Kellogg was to take it up. I found means for giving my name for $5,000; I had $5,000 and they wanted the money and I gave them it. I gave them the money exclusively on the letter. The letter does request me to give two drafts at 60 days and does not ask for any cash. I had the currency, and I made the local paper
49 through Mr. Kellogg some way. I called on Moss during 1857, some six times, and talked with him about the Elder matter; I have no recollection as to the time of the year I first called on him; couldn't say how far apart the different calls were; I had spoken to Capt. Moss about the return of this money. He told me he would go and see Kellogg about it and try to get it. He came back and said that Kellogg said he couldn't do any thing; that my money was in there and it was no better than theirs, and I think the expression was "By God, they wouldn't pay it," or something of that kind. I told Moss before he went to Kellogg that I had made them the loan and I wanted it returned as it was promised to be returned. That is the substance of what I said. I do not remember what Mr. Moss said in reply, only that he agreed to go and see Mr. Kellogg. He went, and saw me afterwards; don't remember when he next saw me, but when he did he told me that he had seen Kellogg, and that Kellogg said to him "You have got your money in here and I have got mine in, and Gregg's money is no
50 better than ours; and by God! I won't pay it."

50 *Testimony of Jos. E. Elder.*

And further to sustain the issues on his part, the plaintiff called as a witness JOSEPH E. ELDER, who, having been duly sworn, testified as follows:

I knew Capt. Moss, Mr. Gregg, and Mr. Kellogg in Dec., 1856. I was then a commission merchant at St. Louis, Mo., and had business dealings with the firm of Kellogg, Moss & Co.; was in Peoria on the 23rd of Dec., 1856. I don't think I got any money from Kellogg, Moss & Co. I got some drafts, to the amount of $7,500, from Mr. Kellogg. I should judge that I got them at Kellogg's office. I can't recollect at what time I first saw Kellogg at that day. I suppose it was early in the morning. I think it was late in the day when I got the drafts. I went expressly to get money. I didn't go there direct from St. Louis. I think I had been to Burlington, and stopped there on my way back; am sure it was on the 23rd of Dec.; have referred to my letter books, &c., and found two or three letters, in which I stated the fact, on the 24th of Dec., that I had just returned from Peoria. I have an impression that
51 Mr. Kellogg said, when I asked him for the money, that he would see Capt. Moss, but I can't swear positively to the fact now. My

impression is, that he said he would see Capt. Moss, and raise all the money he could. I think I wanted $10,000, and he raised $7,500. I presume, as I went there for the purpose of getting money, that I saw Mr. Kellogg the first thing in the morning; he was boarding at the same hotel at which I stopped. The impression upon my memory is, that I met him at breakfast, and he, as usual, professed a great deal of friendship, and said he would raise the money, if possible. I had so many visits of that kind at Peoria that I can't recollect the particular one. On one or two occasions I know that I went down to the distillery; am not certain whether I went to see Mr. Gregg on this occasion or not, with reference to this matter, or whether he said he would go down and see him. I presume I saw both Mr. Kellogg and Capt. Moss that day, but can't be certain about it; don't recollect whether or not
Mr. Kellogg said anything about seeing Gregg; can't be certain
52 that Kellogg said anything about where he raised the money.
I know I had three several drafts from him. I only know that from the entries in my book. There were three several drafts of $2,500. The drafts were given me by Kellogg; they were bank checks, sight drafts, the same as money; they were drawn on three parties in St. Louis. I raised the currency on them by depositing them in banks; they were drawn by banking houses in Peoria on houses in St. Louis. I think one was on the State Saving Association; the others I have forgotten. Probably one was on Clark Brothers & Co.

Cross-examination:

I was frequently at Peoria on business. The only way I fix the date as the 23d of Dec. is by reference to letters written on the next day. The three drafts are also entered on my cash books on the 24th. There may have been two on the same institution, but drawn by different parties in Peoria; none of them were drawn by Gregg. I think I saw Mr. Kellogg early in the morning, at the hotel; have no definite recollection
when he gave me the drafts, but my impression is, that it was
53 about one or two o'clock in the afternoon. I presume I barely got the drafts in time to leave the city that afternoon. Still, if a person should swear that they were paid to me at 11 o'clock, I should not deny it. The matter I was there to get money on was a company matter—Kellogg, Moss & Co.; it was to take up some acceptances that were given by me for their accommodation. Kellogg, Moss & Co., of Peoria, drew upon my firm in St. Louis. I accepted it, and became liable as an accommodation acceptor. I was doing a large grain business with Mr. Kellogg; he got associated with Kellogg, Moss & Co. building a railroad, and I was foolish enough to accept this railroad paper, and it burst me up.

Testimony of Cha's S. Clark.

And further to sustain the issues on his part, the plaintiff called as a witness CHARLES S. CLARK, who, having been duly sworn, testified as follows:

I was the secretary of Kellogg, Moss & Co. It was my business to see that the books were kept; I attended to the book-keeping in some measure. I think this is one of the books of the firm; it was kept in Dec., 1857, and 1858; I think that is one of them also, for the year 1857.
I think these are the only two I recognize.
54 (Journal of Kellogg, Moss & Co., for the years 1856 & 1857, presented, and the portion of the book for the month of Decem-

ber, 1856, offered in evidence. The purpose for which it is offered is to show that the money that was given to Elder was not charged in the book of Kellogg, Moss & Co.; that is to say, that it was not money that they paid out, but money that they did get from Gregg.)

I don't find any charge of any such sum of money as $7,500 as having been received from Mr. Gregg, or having been paid to Mr. Elder, or any credit of any such sum.

Question. The next book is the ledger of Kellogg, Moss & Co., covering the same time—the years 1856 & 1857, and perhaps 1858; will you look at the account of William Kellogg; I see it says Kellogg, treasurer; just state what that means?

Answer. Mr. Kellogg, during a portion of the time, was treasurer of the company of Kellogg, Moss & Co.

Question. Just look at this private account; what I am offering now is the private account of Mr. Kellogg with the firm of Kellogg, Moss & Co. for 1856.

55 Answer. I don't see any item of any credit in Dec., 1856, to Mr. Kellogg, for $7,500 paid to Mr. Elder; I have looked at the private account of Mr. Kellogg, and find no debt or credit answering to this charge—that is, $7,500; I have also looked at the account of W'm Kellogg, as treasurer, and find nothing in that account; the charge might be in Mr. Elder's account; I think we did find on the other trial some charges of drafts; I find no entry in Mr. Elder's account of Dec., 1856; there is one of Dec., 1857; that refers to page 245 in the journal; debtor to bill payable, $25,000; Moss, Kellogg & Co., notes of $1,000 each; it appears to be in 1857; we found on the other trial, somewhere, three drafts of $2,500 each, to Mr. Elder, I think; that is, one draft on the Central Bank in May, 1856; on the 20th of Dec., 1856, Joseph E. Elder, St. Louis Exchange, $2,500; Feb. 21st, 1857, $5,000; that is page 194 of the journal; I should think it was a check given on the bank by the St. Louis Exchange; there is a list of what I should call kiting drafts by the looks of them; 8th of Dec., $1,000; 11th, $4,000; 28th, $2,500; on the 3rd of Feb., 1857, $2,500; 10th, $3,000, and on the 13th, $2,000; the 23rd of Sept., $,2,500; 22nd of Nov., $1,500; 8th of Dec.,

56 $4,000; 20th of Dec., $2,500; 3rd of Feb., 1857, $2,500; 10th, $3,000; 13th, $2,000, on page 195. These drafts were usually drawn at 60 days; the books do not show; I do not find anything; Kellogg was also engaged in a general grain business; he was in partnership with Walker and Bronson, of Chicago, under the style of Kellogg, Walker & Co., at Peoria; I think he was attending to that business at the same time that Kellogg, Moss & Co. were building the railroad; I was well acquainted with W'm Kellogg; he was the general financial agent of Kellogg, Moss & Co. for the first year or two; I don't think Mr. Moss took any part in it whatever, up to 1857; Mr. Lightner was the superintendent; there was no president; Mr. Gregg held no office; he gave it no personal attention; the whole business was pretty much managed by Mr. Kellogg for the first 18 months.

Cross-examination:

I have just examined the journal and ledger of Kellogg, Moss & Co. for the month of Dec., and found no evidence that Kellogg had paid anything to the firm; I did not examine Moss' account; I did not see anything to indicate that Moss, or Kellogg, or Gregg had fur-

57 nished funds to the firm to pay off Elder, Dec. 23d, or any date about that time; there is evidence that there is a charge against Elder, Feb. 21st, 1857, of $5,000; that would be about 60 days after the

transaction. If Elder had got time drafts at 60 days on the 23d, they would be charged on the day they had to be paid; I don't find an item in Elder's account in which he is charged, on the 23rd of Dec., with $2,500. These accounts were sometimes inaccurate as to the date, for it was very difficult to get the account up from Mr. Kellogg, and the dates did not always agree with the real transaction; the dates of the entries in our book would not always correspond with the date of the transaction; the reason was, that Mr. Kellogg carried a very large amount of transactions in his head, or on a memoranda in his pocket, and it was impossible for us to get acounts from him at the time; we would get them as we could; he would meet a creditor of Kellogg, Moss & Co. on the street, step into a store and give him a check or draft; perhaps we would find it out a week or ten days after, may be not in three months; we did our best to get the accounts on the books
58 in some shape. Mr. Kellogg was careless, but of great memory; I was acting secretary, I think, until early in 1857; I have no knowledge of any such transaction as mentioned by Mr. Gregg, in which Gregg gave $5,000 cash to Mr. Kellogg, and local paper for $5,000 more with reference to Elder, nor have I found anything in the books of the company that would indicate any such transaction.

Redirect examination:

I stated that I knew of no such transaction between Gregg and Kellogg at the time. My memory is not sufficiently accurate to answer whether I knew, on the 23rd of Dec., 1856, of Mr. Elder's being paid $7,500. I knew we owed Mr. Elder money, and that he was frequently pressing for it. He was in Peoria on several occasions and often wrote for money. I did not find on the book any such account as $2,500 on the 23d of Dec., 1856. I don't quite mean that we could not rely upon the books generally, but perhaps this, that the charge of the 20th of Dec. might be the same one as Mr. Elder's credit of the 23d—that he might make these errors. I think that the $5,000 he got on the
59 20th of Dec. might have been on the 23d. We relied upon getting those memoranda frequently after the transaction. There is no more likelihood that there was a mistake about that, so far as I know, than about any other account in the book. I have precisely the same confidence as to that being correct on the 20th of Dec. as I have of any other account in the book. The only reason I say it might have been the 23rd is, the 23rd is near the 20th. The books themselves show that they were not kept regularly. For instance, there will be Dec., 1856, and you may find July, 1856. 20 pages in the latter part of one of them is devoted entirely to a correction of the accounts—to rewriting a good many accounts on the journal. There are some entries of Jan., 1857, that are not on the original account. I find a charge, Joseph E. Elder Dr. to William Kellogg, draft of Jan. 19th, 1857, $2,500, and draft of March 19th. I don't see anything further to throw any light on the question.

The plaintiff, further to sustain the issues on his part, called as a witness E. F. NOWLAND, who, having been duly sworn, testified as follows:

60 *Testimony of E. F. Nowland.*

I know Joseph E. Elder; saw him in Peoria about the 23d of Dec., 1856. I think he went away that night or the next day. I did not see him the next morning. I saw Mr. Kellogg in the morning at about 8 or 9 o'clock, and also immediately after dinner. Capt. Moss lived about

a mile from the hotel. I suppose it was about one o'clock that I got to Mr. Kellogg's office.

(The plaintiff then stated that he proposed to prove by this witness that only a few moments after Kellogg had obtained the $10,000 of Gregg he told the witness that he had received the money from Gregg, and had fixed Elder off, and that Elder had gone home; to the introduction of which evidence the defendant objected, which objection was sustained by the court; to which ruling the plaintiff then and there excepted.)

Testimony of W'm S. Moss.

WILLIAM S. MOSS, the defendant, having been duly sworn, testified as follows:

I shall be 73 years old next June. I reside in Alameda Co., California. Have lived there a little over 8 years. Before I moved to California I resided at Peoria, Illinois. Left Peoria in April, 1861,
61 and have, since that time, resided in California. I am the defendant in this suit.

(Letter previously read in evidence shown to witness.)

I have seen this letter before. Mr. Kellogg brought it to me the day it is dated—I think the 23rd of Dec., 1856. I was up at my farm on the bluff, making some fence, I think, when he brought it to me. I signed the letter and handed it to Mr. Kellogg. I did not authorize him to present that letter to Mr. Gregg—to deliver it to him. I directed him to show it to Mr. Gregg—and if he got the drafts that this letter was to go with the drafts. I did not see Elder on the day of the date of this letter, nor Gregg, that I have any knowledge of. I did not on that day give Kellogg any authority to treat with Mr. Gregg, on this Elder matter, except the authority contained in this letter, Have no recollection of seeing Mr. Kellogg again that day, after I gave him that letter. I did not learn from any source on the day of the date of that letter what was done with it. I did not receive any knowledge from any body as to what, in fact, Kellogg got on that letter that day. I never
62 saw the letter nor heard of it from that day until I was sued on it year before last, 1868; I mean that I never heard of the transaction. I was in court when Mr. Gregg was sworn. I recollect that Mr. Gregg spoke to me during the year 1857, on one or more occasions about this Elder affair. I think it was the latter part of June, 1857. M. Gregg came to me and asked me to go and see Mr. Kellogg, about $10,000 that he had loaned him in drafts, and had had to pay, and wanted Kellogg, as financier of the company, to pay that money back to him. I went and saw Mr. Kellogg and he told me that he had no funds of the company in his hands and said further, "I have advanced large amounts to the company, and so have you; and Mr. Gregg is no better than you or I, and he will have to put that money in, and more with it, or we all go down." Those were the exact words. I went back and told Mr. Gregg precisely the words. Gregg said he thonght it was very hard that he had to pay those drafts in St. Louis. Mr. Ewing, his commission merchant there, had stopped it out of his sales of high wines, and he could not spare it out of his business. I under-
63 stood him to say he let Kellogg have the drafts for Mr. Elder. I think he said two drafts. I never heard any intimation that he let Kellogg have one dollar in money until I heard it on the trial. He did not make any claim against me at the interview, in June, 1857, nor speak of the letter. I have no knowledge that he spoke to me in rela-

tion to this matter more than once during 1857; he might and he might not. He did not come to me during 1867 and claim that I was personally liable for that draft. He never in any interview, during 1857, indicated that money had been advanced on that letter, except the drafts that the *meter* requires. I never heard, from any intimation that Gregg made to me or anybody else. that Gregg advanced anything on that letter different from what the letter requests him to advance, until I heard Mr. Gregg sworn on the stand here. I never heard a word said about this letter from the time I delivered it to Kellogg until after I was sued, consequently it had gone entirely out of my mind. At the date of the letter I was a member of the firm of Kellogg, Moss & Co. We were
64 then very much embarassed and had to raise money in any fair way we could.

(The defendant here offered the witness an agreement or paper which is copied below.)

I have seen that agreement before. The signatures are all genuine including my own. They are William Kellogg, C. S. Clark, R. Gregg, H. Lightner, James Knox, P. B. Roberts, A. C. Harding, and myself. There were negotiations and talks between the parties who signed that agreement in relation to the transactions that were put in writing there.

The defendant then offered and read in evidence said agreement of December 1st, 1857, which is as follows:

65 *Agreement.*

This agreement, made this first day of December, A. D. 1857, by and between the respective partners of the firm of Kellogg, Moss & Co., whose names are subscribed hereto, witnesseth:

That whereas the subscribers have heretofore been doing business as lessees and contractors of the Peoria and Oquaka Railroad Company, as copartners, under the name and style of Kellogg, Moss & Co., by the terms of which said copartnership the capital stock of said company was fixed at the sum of three hundred thousand dollars; and whereas some of the members of said firm have advanced moneys or funds to said firm beyond the amount of their proportion as fixed by the said capital stock:

Now, therefore, it is agreed as follows: First. That each and every member of said firm shall make a statement of cash paid and advancements made to said firm, together with ten per cent. interest from the date of each payment; said accounts to be made up to the date of this instrument, December 1st, 1857, and the accounts so rendered and agreed upon, after all fair charges, sett-off, & deductions are made, shall, after this date, remain as capital stock of said firm, and represent the capital stock of each individual member in said firm at this date, & shall
66 fix and determine their interests therein respectively & pro rata.

And whereas, also, it is necessary to liquidate the present outstanding indebtedness of said firm, that further advances in money or property should be made and raised, it is therefore further agreed by & between the said subscribers hereto that, for any and all monies advanced, and property real or personal advanced, appropriated, and used for the purpose of paying any of the present debts of said firm, on and after this date, to wit, December 1st, 1857, such amounts of money and the value of such property—to be computed at the rate at which it shall or may be used—so advanced shall be represented by an equal amount of preferred stock of said firm, to which each member shall be respectively entitled, and shall be first

repaid. with interest at ten per cent. per annum, from the date of the respective advancements, to each member of said firm, after the present debts are paid, from the earnings of the Peoria & Oquaka Railroad Company, or other means of the said firm. After such advances are repaid and returned, the capital stock of each individual member in said firm shall be refunded to each member respectively, pro rata, from the earnings of said Peoria & Oquaka Railroad.

67 When the present advances are so refunded and the debts paid, then the preferred stock shall become a part of, & be added to, the capital stock of said firm, & shall increase the amount of the interest of those who may hereafter advance funds or property for paying the present indebtedness, to the amount advanced by each respectively, & shall share in the profits & losses pro rata.

And it is further agreed that any member of said firm who shall elect and desire to withdraw from said firm is at liberty to do so by consent of all the then members of said firm, and the remaining members of said firm shall give to such retiring member a written agreement to indemnify such member *again* & the debts of said firm, and at the same time shall also be allowed a certificate of the amount due him from the said firm, the principal of which shall be paid pro rata with the *de*ferred stock, next after the future advances are paid and refunded.

It is also expressly understood and agreed by & between the subscribers hereto that the amount advanced or to be hereafter advanced by them or either of them, are to be refunded to each of them respectively out of the net earnings of said railroad, after defraying from

68 such earnings the necessary expenses of keeping the same in operation.

In witness whereof we have hereto set our hands & seals this first day of December, A. D. 1857.

W'M KELLOGG.	[SEAL.]
W'M S. MOSS.	[SEAL.]
C. S. CLARKE.	[SEAL.]
R. GREGG.	[SEAL.]
H. LIGHTNER.	[SEAL.]
JAMES KNOX.	[SEAL.]
P. B. ROBERTS.	[SEAL.]
A. C. HARDING.	[SEAL.]

Signed & executed in presence of—
GEO. F. HARDING.

69 (The defendant then proposed to prove the talk in connection with it, that is, what transpired, so as to show the understanding of the parties as to what was embraced by the language of said agreement. The plaintiff objected. The objection was overruled by the court. To which ruling the plaintiff then & there excepted.)

Pending the negotiation which ended in the execution of this paper, there was conversation in my hearing between Gregg and others in relation to being parties to this instrument. Gregg was willing to go into the arrangement if the new firm would assume that $10,000. In the first place there was a similar article drawn up, and I believe every mansigned it except Gen. Harding and Mr. Gregg; sometime after, this was got up in the place of it. Mr. Gregg objected to signing it; so did Gen. Harding. Some of our partners in the old company of Kellogg, Moss & Co. wanted to retire, and we had agreed to form a new company, and

let the others out. Gregg objected to signing this unless the company would assume that debt, and Gen. Harding told him that he would
70 not go into the company with us unless every man that had a debt against the company would fund it. Then Mr. Gregg did agree to it and signed the article, and then Gen. Harding signed it, & Mr. Lightner, and Mr. Clark got an indemnifying bond from us five that we would hold him harmless from the outstanding debts. Gregg said that he could not spare the $10,000 out of his business; he wanted it, and it should have been returned to him; that he had made greater advances than he would like to have done. He said it was for drafts that he had paid. I think he paid one of them in April, and one in June. He said he had loaned them to the company to pay Elder off. He said that the company should pay him back that money, and got me to go and see Kellogg, as the financial man of the company, and tell him he must pay it out of the company's money. He gave as a reason why he thought the new firm should assume the debt, that when he put it into the old firm it was understood that he should have the right to take it out again. Gen. Harding said he was
71 not going to put his money into the new firm, and allow the old partners to draw it out as advances. He said if he had put in his money, and the partners who have advanced money to the company should come and take his money out and divide it among themselves, he did not see any possible chance of paying these debts. The reason he came in was to relieve us, but if we took out what he put in we should all go down together. Mr. Gregg finally agreed to withdraw his objections and to put in as deferred stock, and the agreement was thereupon executed by all, including Harding.

(To the introduction of all the foregoing testimony as to what was said by either of the parties in relation to said agreement, before the same was signed, the plaintiff objected; which objection the court overruled, and the plaintiff by his counsel then and there excepted.)

Harding had not been a member of the old firm. I recollect distinctly the circumstances of my going to California in the spring of 1861; I went overland. I commenced buying horses in January, 1861. While I was buying, Mr. Gregg came to me and told me that he knew
72 of a first-rate place—Richmond, Ind.—where he thought I could do better than anywhere else. He very frequently had interviews with me while I was getting up this caravan. I saw Mr. Gregg when I had completed my arrangements—about the time I started. I think he bade me good bye. He never mentioned any claim that he had against me in consequence of the advance he had made in the Elder matter. He never hinted at the letter in any shape, manner, or form. I suppose I had, in horses and wagons, besides what little money I had, some $20,000 *dollars.* I had 140-odd horses and a good many wagons. I started from Peoria. Gregg was living there at the time this suit was commenced against me in March 1868. Process was served on me sometime in March, 1868, at Peoria. I got here from California in February. I had met Gregg before I was served, at the Sherman House, on two occasions. We had a very long conversation and a friendly one. He appeared to be very glad to see me and I was glad to see him. In neither conversation did he make any claim whatever against me. He, neither in person or by any one that he sent, intimated that he
73 had any claim against me before I was served with process. I saw Gregg in a few days after I was served. I spoke to him and wanted the suit put off. I said to him: "Mr. Gregg, you know that I never owed you a cent in my life myself." He said: "I know you

never did." I said: "Why did you sue me, without saying anything to me about it?" He said: "I will tell you; I have lost a great deal of money in this concern, and I understand that you have made a great deal, and I have found this old letter with the drafts up among my old papers, and I took it to my lawyer and he thought that I could hold you responsible." I said: "Mr. Gregg, do you not know that that was a company debt; it was none of my debts." "Well," said he, "I know it, captain." "Now," said I, "if you will go and tell your lawyer that you know that that was a company debt he will advise you to dismiss it at once." He said that he would go and see his lawyer, and at the same time I asked him about having the case continued. He said that I should have all the time I wanted. When he said that he understood I had made a great deal of money out of this railroad adventure,
74 I replied to him that I would give him or any other man $100,000 that would make me whole; and I will agree to-day to give any body $200,000 that will make me whole in this railroad matter. I think that he said he found the letter up garret with his old papers. He told me that he had forgotten it. He said that he showed the letter to his lawyer. I had not heard a syllable about the letter from December the 23rd, A. D. 1856, down to the time that Gregg mentioned it as an excuse for suing me. He said that he found the letter with the drafts in it that he had taken up. He never has shown me the drafts; I never saw the letter until I came into court. He never has offered to show me the drafts since.

Cross-examination:

I authorized Mr. Kellogg to send that letter with the drafts. I supposed he was going to do that, as I understood Mr. Kellogg the purpose was to show that it was not Mr. Gregg's individual debt, but belonged to the company—it was our debt, not his. It was to give character to the drafts. The reason we did not give our own drafts was, I sup-
75 posed, if you will allow me to suppose, because I don't know anything about it further than I have said, that probably Kellogg would get the drafts of Mr. Gregg in our favor, and we would endorse them. That was my idea. Well, probably I couldn't tell any more than I have. What was the use of a letter going where indorsement went? It was to give credit to the drafts we were kiting in various ways. And after that move Kellogg had no authority from me to endorse the drafts. I supposed Gregg would draw the drafts in favor of Kellogg & me, or in favor of Kellogg, and I would endorse them to give them credit. The letter was to go with the endorsement. I understood from Mr. Kellogg when I signed that the letter was to go to St. Louis with the drafts—it was only a supposition. I don't recollect that there was anything said particularly about it. I supposed if he got the drafts made payable to us that we would have to endorse them. I don't know that I do see any sense in the letter and endorsements going together, except to give the drafts more credit. I didn't know that I would have to endorse it. These drafts were made payable to Mr. Elder, and
76 I didn't know but that he would endorse them. Elder would want the letter to show that it was not Elder's debt. It wouldn't have been Gregg's debt if I had given the draft. It would be his draft. Gregg and I at one time signed notes payable to the company, and we didn't owe the company a cent. This was done in the same way. We got along without a letter then. I did not understand when the letter was presented to me that Kellogg and myself were loaning our credit to the company. I didn't understand at that time that I was making my-

self responsible to Gregg. It was for Gregg and the company. It was for Gregg's benefit as much as mine.

Question. Let me read this to you. "If you will send us two drafts of 60 days, $5,000 each, we will return you the money." You did not intend to do that?

Answer. My understanding was that Kellogg was to pay them, as financier of the company, as soon as he got the funds in his hands, or take care of them. I did not understand that I created any liability on my part to pay this money back to Gregg. I signed it because Mr. Kellogg wanted me to. He said that it would give him a better
77 chance to get those drafts of Gregg's discounted or cashed. It was an accommodation affair—it was to accommodate Gregg, Kellogg, and all the partners that were in it. Kellogg told me that he would take care of it himself. I signed the paper, but I had no expectation of any liability, because it was for our benefit. Well, probably, I couldn't tell how it would help the credit of the drafts. I knew Elder was in town from what Mr. Kellogg said. That's the only way I knew. I don't know whether they ever raised the money. I don't know that it was ever paid any further than what Mr. Gregg told me. I never heard any more about it that day. I couldn't say whether I ever asked Kellogg if Elder had been paid. I never heard any more about that debt until Mr. Gregg came to me and said that he had these drafts to pay, and that he couldn't spare it out of his business, and he wished I would go and see Kellogg. I did not understand that this was an advance to the company on the part of Gregg. I understood that he lent them to the company for the benefit of himself and every member of the
78 concern. I didn't understand that I went the company's security; that it would be paid back; & I don't understand that yet. When I went away from Peoria, in 1861, I had some $20,000 or $30,000 invested in horses, which I owned myself. I supposed Gregg was then living in Peoria. I frequently saw him. The property was purchased in my name. I was then solvent. I was insolvent in 1857, and continued so until the latter part of 1860. Was solvent in 1861. Don't know how much I was worth in 1860; don't know what I was worth in 1862; don't know what I was worth when I went to California; don't know that there were several executions out against me when I went to California. I never had a judgment against me. I don't think I did swear on a former trial that, in 1858, I had 30 or $40,000 worth of real estate unencumbered, because, if I did, I made a mistake, as it was all encumbered from 1857 to the latter part of 1860. I made my property over to Bradley in the fall of 1857.

Question. Were you asked on the former trial how much real estate you had unencumbered in the county of Peoria after Dec. 1857?

79 Answer. Well, sir, if that question was asked me, and I answered as I understood the question, I should know I had none; but yet I might not have understood your question, and might have answered yes instead of no.

Question. For instance, the question was put to you: "When were the first judgment' against the company entered? Answer. I couldn't say, but it was a very short time, I think, after they had secured Mr. Bradley. There began to be some pretty heavy smoke that scared him. Question. Do you know what was done with the first judgment? Answer. I don't recollect exactly. Some of the property was sold. Judge Wead had two judgments against me then. Question. You had real estate, had you, at that time? A. I have a considerable amount; I don't know myself. Q. To what amount? A. To $30,000, at least;

$30,000, and may be more—or less, I should say; some of it they happened to miss." Now you can state whether you made this answer: "Some of it they happened to miss. I don't know how they did; but they did, some way or other, & some of it they haven't got yet."

Answer. If I did, I didn't understand the question. If I said
80 I had any real estate then unencumbered, I didn't mean so to convey that idea, but I meant this: There was a legal title, but still I had given bonds for this very same land, and the notes I had taken for these bonds I had transferred to Mr. Bradley. If I had understood your question, I would not have said that I had $30,000 worth of unencumbered real estate, because it wasn't true. I had that much real estate—the legal title was in me—but I had transferred the notes, and they had held on. Some of the notes run 10 years. I became solvent in the fall of 1860. Then I sold out this railroad to the C., B. & Q., and that released a good deal of the property that I had given to Bradley. Don't know that, as late as Feb., 1861, executions were returned against me "No property found." Never knew anything about a judgment of Nellis vs. Moss. Think likely I was served with process, but there were so many *several* on me that I didn't keep any record. People had been sueing me lively before that time. Some executions were returned "Property found," and some were not. The execution returned "No property found," March 18, 1861, was with Purple,
81 and, as far as I was concerned, was settled, and Purple agreed to let me out. In the case of Manning & Merriman, I paid my share before I went away; but they could not release me unless they let all go. The sheriff came to me with the execution in 1862, after my return, and Mr. Manning explained the settlement to him. William H. Buttrick went to California with me, and helped to buy the property. I agreed to furnish the capital, and he was to have one-half the profits. The property went in my name. Not a dollar of it was ever levied on, as I know of. Buttrick had no other interest in it, except that he put some oxen into the drove, and some horses, and was to share the profits. Charles S. Clark, to my knowledge, did not threaten to sue me unless I settled a claim he had against me. I have no knowledge of telling him that the property belonged to Buttrick. I don't know that I ever owed Mr. Clark a dollar. I did make out a statement of the money I had advanced to Kellogg, Moss & Co. to get my deferred stock. I never got any deferred stock. I recollect distinctly that, when the agreement was made about funding the debt, the claim of Gregg's of $10,000
82 was talked of. Before this Elder matter, Gregg had advanced more money than he had agreed to at the start. I never heard him insist that his former advances should be paid back, but he did insist that the other should. I understood, at the time of the conversation about funding, that Gregg referred to the drafts Elder got on the 23rd of Dec., 1856. Mr. Harding told Gregg that he would have to go in with the balance or he himself would not advance any money. I had advanced twice as much as Gregg and the other men to the company, but Harding would not go in unless we all put in our claims. I did not swear, on the first trial, that Gregg never advanced anything to Elder. I don't know to-day that he ever did only as he and Kellogg told me. I never heard that he advanced a dollar in money until he swore to it here on the stand. Kellogg did not pretend to deny that Gregg had paid this $10,000 to him when I went to see him about it. I can't deny that Gregg had advanced $10,000 in some way for Elder, because I only know what they told me. At the time of the funding I understood that everything that Gregg had advanced went in equally. I

83 have heard Gregg say that, at that time, he had loaned to the company seven mortgage bonds of $1,000 each. I don't know anything about them as to their being funded. I didn't hear a word said about them at that time. Kellogg was present and signed the paper. Mr. Gregg told me that he had loaned the company 7 mortgage bonds, but I never saw them. I swore at the June term of this trial, and swear now, that they were not funded, to my knowledge, and nothing was said about them, to my knowledge, at that time. I can't tell you how it happened that we were so anxious to get in this $10,000 and left out the 7 mortgage bonds, any more than this: Mr. Gregg wanted the new company to assume the $10,000, and Mr. Harding would not agree to it, and there was not a word said about the mortgage bonds at that time.

Testimony of C. S. Clark.

C. S. CLARK, a witness, being called on behalf of the defendant, testified as follows:

I was sworn yesterday. Stated that I was a member of the firm of Kellogg, Moss & Co., and acted as secretary and book-keeper for a little over a year. I had a conversation with Mr. Gregg soon after this
84 suit was commenced against Capt. Moss at Peoria. I think I met Mr. Gregg near the First National Bank. I was then living at Peoria and Gregg was living at Chicago. Gregg asked me if I recollected being with Mr. Kellogg at the time Mr. Elder came there for money, and coming down to his office and his paying money to Mr. Kellogg, or drafts, or something of that kind. I told him I didn't recollect it at the time. I would think it over, and if I recalled it to mind I would let him know. He told me he had sued Capt. Moss for this claim, and I told him that I was astonished he had overlooked that amount so long. He said that he had forgotten it or overlooked it until, in overlooking his old papers, he came across this letter. I said he could verify it by going to his old distillery books. He either said that he had or would look at them. My impression is that he had been down and found no charge to Kellogg, Moss & Co.; but it might have been that he would go down. He had a good book-keeper. The books would either show an entry or fail to balance. He did not intimate that his books had been burned or were out of his reach. As often as
85 Gregg and myself met we have talked about these railroad matters from the fall of 1857 up to within a year or two. We had a mutual interest in knowing that the judgments were satisfied. I never heard him intimate that he had a claim against either Moss or Kellogg connected with this Elder matter until after this suit was brought.

Cross-examination:

The best of my recollection is that he told me he would look or had looked over his books. My recollection would be that he said books, not papers. I think he did not say, after he said that he found this letter in looking over his old papers, that he would look them over again and see if he could find anything more about it. I knew nothing, and there was nothing said about his books having been burned. If it should turn out, as a matter of fact, that the books had been burned, I don't think it would heighten the probability that he said papers, and not books; because it was the first thought that struck me, that he could instantly verify it. It was a casual conversation of about five minutes. He did claim at that time that I was with Kellogg when he gave him

86 the money. I do not recollect now being with Kellogg. I knew at the time that the company was indebted to Kellogg. I never heard Gregg claim that the company owed him for this $10,000. I did hear him make some claim against the company for some bonds.

Testimony of A. C. Harding.

A. C. HARDING, a witness called on behalf of the defendant, having been duly sworn, testified as follows:

I reside at Monmouth, Illinois. Was acquainted with Mr. Kellogg in his lifetime. Knew W'm S. Moss, the defendant, and Mr. Gregg, the plaintiff. Mr. Kellogg died in 1859. The signature to that paper, the funding assessment of December 1st, 1857, is my handwriting. I recollect distinctly the circumstances that preceded the signing the paper. I was not a member of the firm of Kellogg, Moss & Co.

Question. Were you present at any doings or negotiations between any of the parties to that writing that you now hold in your hand immediately preceding the evening of its execution?

(Objected to by plaintiff. Objection overruled. Exception taken by plaintiff.)

87 I remember of no distinct date, except when the instrument was executed. On that day the parties met by a general appointment to adopt a new partnership arrangement. It had been assented to that a new partnership must be formed to relieve the company from its embarrassments. Mr. Knox was present and all the members of the firm. The same proposition was then presented which is contained in that agreement. A similar one had been handed around for some weeks. Mr. Gregg had it in his possession for some time; but I don't remember that he said why he didn't sign it. He retained it, and the new partnership didn't occur. They had this meeting to find out what was to be done. On that day the subject of conversation was the funding of all claims which the partners had for advancements made to the company of Kellog, Moss & Co. Mr. Kellogg, Mr. Moss, Mr. Knox, and Mr. Gregg claimed to have made large advances beyond what they had first agreed to, and still the company was very much embarassed. Capt. Moss was very reluctant to fund the large advances he had made, and Mr. Gregg was reluctant to', and complained that he couldn't spare so much

88 money from his private business. I remember that he said he had been induced to give drafts on Mr. Ewing to pay Elder, which he had been compelled to take care of. I remember saying to him, What are your private interests worth if this company goes down? You all go down with it. It was unanimously agreed there by all parties, with good feelings towards each other, and this agreement was signed. He stated the amount of those drafts at $10,000. I understood that there were two of them which Kellogg or Kellogg & Moss had promised to take care of and had failed to do, so that he was compelled to. He wanted the new firm to assume these claims, and I objected.

(To the introduction of all the foregoing testimony as to what was said by either of the parties in relation to said agreement before the same was signed the plaintiff objected; which objection the court overruled, and the plaintiff then & there excepted.)

The proposition upon which I was induced to go in was that all the partners should fund the whole thing. They all signed before I did; my name was last on the list. I never heard then or since Gregg claim that he had an individual claim in relation to this Elder matter

89 against Moss & Kellogg, or either of them. I became a member

of the new firm by signing that agreement; the style of the new firm was Moss, Harding & Co. It took possession of the property transferred by that agreement to it which was the lease and rolling-stock of the Peoria & Oquawka Railroad, between Galesburg & Peoria, and took possession of the offices and went on to transact business as contemplated by the agreement.

Cross-examination:

On the 1st day of Dec., 1857, we all met for the purpose of making that contract. Besides the signers George Harding was present, and perhaps Aleck McCoy. Don't remember that I have ever talked with George Harding about his presence. Do not say that at that time Gregg funded any claim that he had against Kellogg & Moss. There was nothing said about any such claim, except that Kellogg or Kellogg & Moss had promised to take care of those drafts and had failed to do so. The drafts were on Ewing to pay Elder. Was a witness at the last trial. Couldn't be certain that at that trial I swore I didn't know anything about the Elder doings. Do not now recollect one word that I
90 testified to at the last trial about Elder. I don't think that any conversations I have had with parties to this suit have helped my memory any. When this suit was brought I had no earthly interest in it. Subsequently I made an agreement with Capt. Moss that if he was beaten I would pay a quarter of it. This morning just before I got on to the stand he released me from that agreement by this writing, the consideration of which is one dollar. I never expect to get the dollar back. The object of making the agreement was that I might be disinterested in this case. In the arrangement between myself and Capt. Moss and Mr. Bradley it was stipulated that I should have an interest in this, and I agreed to it. I became liable for a part of the judgment. I suppose Mr. Moss will have to pay the other ¾ unless somebody agrees to pay part of it. I voluntarily assumed to take the responsibility. I always considered that it was a company debt, if there was any debt at all, and that Mr. Moss ought not to be made liable on account of the transaction talked of. I thought that if Capt. Moss was to be trapped by this old letter that it wasn't right that he should be made to pay what
91 was in fact a company debt. They funded all of the company debts. The origin of this claim was a claim against Kellogg, Moss & Co. I never knew of any such claim against Kellogg & Moss. I knew that the debt he had for drafts was funded. I think I remember very distinctly that Gregg alleged that they had promised to take care of those drafts, and they hadn't done it, and he was compelled to pay them. I am satisfied that they were drafts on Ewing, and were talked of that they went to pay Elder. If it should turn out that on the other trial I said nothing about Elder it would not shake my memory a bit.

Question. On the former trial were you asked this question: "How do you identify the indebtedness spoken of with the indebtedness spoken of by Mr. Gregg; you say it is the same indebtedness?" Did you make this answer to that question? "He complained that Mr. Moss & Mr. Kellogg had promised to take care of the sum of $10,000, which he had been compelled to pay by reason of their not taking care of it, and that is the sum he said he could'nt spare from his business, but he did agree to fund all the others. I refused to go in
92 unless all the partners would put in all their claims?"

Answer. I certainly said that.

Question. Did you answer this question as follows: "You spoke of his mentioning Ewing's name in connection with it? He spoke of the Ewing drafts?"

Answer. I said that to-day, I believe; yes, sir. No partner ever claimed a debt against the firm after that funding; I am not certain that I said anything about Mr. Elder at the former trial; I might not have been asked; could'nt tell whether I was asked for the whole conversation or not; don't remember distinctly whether Lightner was present or not; know Charles S. Clark was there; I know that all the parties who had a little stock in were anxious to get out; I believe Clark was anxious to get out; Lightner was very anxious to get out; I guess most of the partners would have been glad to have got out then; no vouchers were presented to me by Mr. Gregg after this agreement; I have every reason to believe they were presented to the company, and that his account was made up; I understood it was between
ninety & a hundred thousand dollars; I don't know anything about
93 that of my own knowledge; his account was made I think with all the other partners; there never were any certificates of deferred stock made; the amount of each one's advancement to the company was the amount of his deferred stock; the books would show that, or his statement; there was an understanding with the new firm as to the amount of advances of each of the old firm; the books will show, as I understand, what each man had there; I mean the books that were kept by Mr. Follet; I don't know where those books are; I never looked to see; I don't think that I ever told Capt. Moss or anybody else that those books would show; I presume they have examined the books; I don't know whether the attorney for Moss or any body else has examined the books; I don't know as I have ever heard Moss say that he had; I heard Capt. Moss say that Mr. Follet was employed to make up the accounts of the old partners in accordance with that agreement; don't know where Follet lives; he lived in Peoria then; I don't think he lives there now; he used to be a railroad man; it don't strike me that I have heard the books referred to as important in any particular way. I understand there
94 is such a man as Mr. Ewing in St. Louis; never saw him in my life; don't know that Mr. Moss or one of his attorneys has been down to St. Louis to see him; I should think Gregg would have the drafts if he paid them; I have often urged that Mr. Ewing's testimony should be taken. I have understood that Capt. Moss said the debt was funded and it wasn't necessary; didn't hear Moss say that, but got it through others.

Re-direct examination:

Ewing, as I understand, was Gregg' commission man in St. Louis.

The defendant then offered in evidence the deposition of Buttrick, which is as follows:

95 *Dep. of W. H. Buttrick.*

Deposition of William H. Buttrick, taken the twenty-third of July, A. D. 1868. Taken at the city of Stockton, county of San Joaquin, State of California, before A. G. Brown, esq., justice of the peace, by virtue of a commission issued out of said court on behalf of said defendant.

WILLIAM H. BUTTRICK, being duly sworn according to law, and examined upon interrogatories, deposes and says:

1st. What is your name, residence, and occupation?

Ans. My name is William H. Buttrick; age, thirty-eight years; my

residence, in Castoria Township, county of San Joaquin, State of California; my occupation, farmer and stock raiser.

2nd. Do you know the parties to this suit respectively, and how long have you known them?

Ans. I do know plaintiff; have known him from the time I was engaged by the companies of Kellogg, Moss & Co. and Moss, Harding & Co., (of which firms I believe plaintiff was a member,) as conductor on the Burlington and Oquawka Railroad—I think about thirteen
96 years ago; have known defendant about twenty years.

3rd. Did you have a conversation with the plaintiff concerning his partnership business connected with the defendant? If so, state when and where that conversation occurred, and what the plaintiff said to you in that conversation, and what you said to him.

Ans. I did—in February, 1861, in the city of Peoria, Illinois. Plaintiff said to me that if it had not been for Captain Moss, the defendant, he never would have got a cent of his pay from the Burlington and Oquawka Railroad Company; do not recollect what I said to him in reply.

4th. What, if anything, did the plaintiff tell you about his having sold out his claim against the companies of Kellogg, Moss & Co. and Moss, Harding & Co., arising out of the Burlington and Oquawka Railroad, or otherwise?

Ans. Plaintiff told me he had sold out his claims against the companies of Kellogg, Moss & Co. & Moss, Harding & Co., arising out of the Burlington and Oquawka Railroad, commonly called the Peoria, Oquawka & Burlington Railroad.

5th. What, if anything, did the plaintiff tell you about the defendant having aided him to secure himself in such business?

97 Ans. As I said in answer to interrogatory 3d, the plaintiff remarked to me that the defendant had aided him in securing his claims against the companies above mentioned, to wit, Kellogg, Moss & Co. and Moss, Harding & Co.

6th. What did the plaintiff say, if anything, about his obligations to the defendant for his aid and assistance therein?

Ans. I have, in effect, answered this before. Plaintiff said that if it had not been for Capt. Moss he never would have got one cent of his pay of the companies of Kellogg, Moss & Co. and Moss, Harding & Co.

7th. Did the plaintiff claim in that conversation that the defendant owed him anything? Whatever the plaintiff said on that subject, state the same fully.

Ans. Plaintiff made no claim that defendant owed him anything. He did not say anything on this subject.

8th. State all that you may know (not already stated by you) in reference to the subject-matter of this suit, and as to whether the defendant owes the plaintiff or not.

Ans. I have stated all that I know in reference to the subject-matter of this suit.

Cross-examination:

98 1st. Are you any relation or connection of the defendant; if yes, what?

Ans. I am his brother-in-law; defendant married my sister.

2nd. If, in answer to interrogatory 3d, you say you had a conversation with the plaintiff, state the exact spot, or room, or place where it took place, what persons were present, and who commenced the same; also, state what time of day it took place, & how long it lasted.

Ans. I think it was in the Peoria House. It was in the city of Peoria. The exact spot or room I cannot state; do not recollect who were present. It was the last time I was in Peoria, in 1861, before leaving for California. I was bidding my acquaintances and friends good-bye; among others the plaintiff in this action. I think plaintiff commenced the conversation stated in the answer to the third interrogatory by remarking that he regretted Capt. Moss was going to California; that if it had not been for Capt. Moss (meaning the defendant) he, plaintiff, would not have got his pay from the aforesaid companies. I think it occurred in the evening; would not be positive; do not know how long it lasted.

3rd. State who has talked with you about this case, and give
99 the words which any person may have said to you about it.

Ans. All that was said to me was when Capt. Moss handed me the commission and interrogatories. He asked me if I recollected that I ever had any conversation with plaintiff.

W. H. BUTTRICK.

NOTE.—The plaintiff objects to the 4th, 5th, & 6th direct interrogatories as leading & incompetent.

100 And, further to sustain the issue on his part, the plaintiff introduced the following testimony in rebuttal:

Charles S. Clark recalled.

CHARLES S. CLARK, being recalled, testified as follows:

That agreement was signed Dec. 1st, 1857. I had a particular interest in the matter. The indebtedness of the firm was sufficient to swamp a good deal more than I had, and several others of the firm. I was interested in that way to the extent of what I had. I felt that if we didn't get this new firm formed, the indebtedness would wipe out everything that any of us had. One of the largest of the creditors threatened that if we did not succeed in making this new firm he would delay no longer, but would wind up the concern. I was present, and remained until the agreement was signed. I had elected before I went to the meeting, in my own mind, if this thing was formed, to go out of the concern; but that I wouldn't go out without a bond of indemnity from every member of the new firm against the indebtedness, and I went away from that meeting with a bond of $400,000 in my pocket. From that circumstance I know I must have remained until the agree-
101 ment was signed. The meeting was in an office—not a large one—occupied by Harding & McCoy. My memory does not serve me about any particular conversation, except that the debts must be funded; those could go out who chose to. I do not recollect about Gregg's objecting on account of Ewing drafts or Elder debts, or anything in that regard at that time.

Cross-examination:

My memory is not distinct as to this matter. I presume I have rather tried to forget the transaction. I recollect that there was a hitch in the transaction, and that it was about funding all the advances of the old firm, but I don't recollect the particular men. I recollect, in general terms, that Mr. Gregg claimed that he had made more advances than he could afford to make; but I don't recollect, at that meeting, any particular conversation of that kind. I suppose Mr. Gregg came into the

arrangement because they all did come in. I recollect of a paper being got up, and that this matter was under discussion for some time.

Re-direct examination:

I don't know that I could mention any one as hanging out
102 more than anybody else. I know that was the difficulty in the first place.

Gregg recalled.

RICHARD GREGG, the plaintiff, being recalled, testified as follows:

William S. Moss was generally considered insolvent in 1858–'59–'60–'61. My understanding was, that he took nothing to California but what was covered, and that he was insolvent at that time. I saw him about the time he started for California within a week, I never saw him after that till March, 1868, the month in which I brought this suit. I was in Europe in 1862. Met Mr. Moss at the corner of Lake & Clark sts. after this suit was brought, and had a conversation with him. He said, in presence of E. G. Johnson, his attorney, who was with him, "You know it was a railroad debt, and they ought to pay it." He said nothing about it having been funded, and I never heard any one claim that until here, on the trial. Mr. Moss was present at the second trial, and was sworn as a witness. I did not admit that it was a company debt. I told him that I sued him upon the personal warrantee of him and Kellogg. I did not say that I would go and see my lawyer.
103 I supposed my letter was a guarantee for something. I supposed, at the time I took it, that it was, and I thought so then; remember perfectly well the time that the agreement was signed—Dec. 1st, 1857. I never talked with anybody about giving a Ewing draft to Elder, because I never gave any such a draft. My reason for refusing to sign the agreement was this: I agreed originally to put $30,000 into the concern. When this agreement was made I had in over $80,000. I looked upon the $30,000 as gone, anyway, but I didn't want to fund that $50,000, and call it deferred stock. I never funded this debt in the world, and am very positive that I never had any conversation about funding it. It was agreed that each partner should make a statement of his account. I did make out a statement, and filed it with the auditor of the company. The statement was made, as far as I know, and it was the intention to make it in accordance with the agreement. The amount I had advanced to Kellogg, on the letter of Kellogg & Moss, was not included in that account. That book is my original account. The statement is on page 117 & 196. I filed a copy of that book with the vouchers. I filed a voucher for every item of the
104 account. I introduced some vouchers on the trial before. These are a part of the same vouchers. We got them of the opposite party at the last trial. My statement was received as satisfactory, and their books were made to correspond with my account. My distillery, and everything connected with it, was burned in 1862. I had a little private ledger that I kept my private accounts in. I didn't bring suit against Mr. Moss before he left for California, because nothing could be made off of him. I never told Capt. Moss that I found the drafts with the letter.

Cross-examination:

My memory is pretty good in relation to old transactions in '57; as to its being reliable, it depends upon how deep an impression was made upon my mind. I remember that I did state that I gave $5,000 in

currency, and $5,000 in checks, and afterwards found that I was mistaken. The reason I made a mistake about the checks was that it did'nt make a deep impression upon my mind. I say that the claims I brought forward to be funded covered all the claims I supposed I had against Kellogg, Moss & Co., except some bonds. The aggregate amount was $95,700; interest, $9,600; principal, $85,000. The road
105 owed me, also, about $10,000 for bonds, principal & interest. They owe me that to-day. My vouchers were filed in the railroad office the day the account was filed, on the 1st of March, 1857. I know that all the property that Moss took with him to California was covered, from common talk, and because executions against us were returned at that time, "No property found." I found that letter in the upper part of my house among some old papers. I knew that I had it, and went to work and hunted it up. I said that I had overlooked it. I swear that I never said what Capt. Moss & Col. Harding say I said about that letter. I don't remember my conversation with Mr. Clark, exactly. I met Mr. Clark on the street, and inquired of him if he didn't drive to my office with Mr. Kellogg. I think Mr. Clark is mistaken as to what he states that I said. I meant to convey the idea to him that I couldn't find the papers. I think I gave my funding statement to Mr. Hazard, or Mr. Follett. The statement I made up was satisfactory to the company. It was talked about as all right; the capt. knew it was
106 right. I swear I have told Capt. Moss how much I had in. I don't swear that he ever saw the account. I did not, at that time, see my account on the books of Kellogg, Moss & Co., because it wasn't on their account books. I have seen it since.

J. E. Elder recalled.

JOSEPH E. ELDER, being recalled, testified as follows:

I don't recollect ever having a draft of Mr. Gregg upon Ewing or any other firm. I did not get from Mr. Gregg any draft on Ewing on the 23rd of Dec., '56. I did not get such a draft from Kellogg.

Cross-examination:

I don't recollect ever having any draft from Gregg.

The plaintiff next introduced the following copy of the judgment docket from the circuit court of Peoria County:

107 *Copy from judg't docket of Peoria Co.*

Judgments in county court of Peoria County, State of Illinois, to January 8, 1858.

July 20, 1857. Adjourned until August 3d, 1857.	F. S. SMITH ET ALS. *vs.* KELLOGG, MOSS ET AL.	July 7th, 1857. Dam., $422 30.

Ex'c. issued Ap'l 20, 1858. Returned July 20, 1858. "No property found."

Oct. 3, 1857, until Oct. 5, 1857.	BENJAMIN C. ALLEN *vs.* KELLOGG, MOSS ET AL.	Sept. 7, 1857. Dam., $319 44.

Ex'c. issued August 13, 1858. Returned. No property found.

GEORGE M. HUNT *vs.* KELLOGG, MOSS ET AL. } Sep. 7, 1857. Dam., $770 25.

THOMAS SCHOLEY ET AL. *vs.* KELLOGG, MOSS ET AL. } Sep. 9, 1857. Dam., $543 72.

Ex'c. issued Aug. 24, 1858.

108 JAMES W. POWER *vs* KELLOGG, MOSS ET AL. } Sept. 10, 1857. Dam. 2,071 56.
Sold.

Execution issued May 26, 1858. Returned, property R. Gregg. Lot bounded as follows: N. W. by Peoria & Aquawka R'r'd; N. E. by Lightner & Co's lots; S. E. by Illinois River; S. W. by Starch Factory, and sold for the sum of $25 00. Purchaser, H. M. Wead, of Peoria.

Oct. 31, 1857, to Nov. 2, 1857. Sold. HOBART HAMILTON *vs.* KELLOGG, MOSS ET AL. } Oct. 5, 1857. Dam. 429 60.

Ex. issued May 28th, 1857. Returned January 1, 1859. Satisfied in part. R. Gregg. Lot sold for $25 00. Lot bounded N. W. by Peoria & Oquawka R'r'd; N. E. by Lightner & Co's lot; S. E. by Illinois River; and S. W. by Starch Factory lot. Purchaser, H. N. Wead.

Dec. 1, 1857, to Dec. 7, 1857. Sold. EDWARD SAYR *vs.* KELLOGG, MOSS ET AL. } Nov. 6th, 1857 Dam., $423 44.

109 Ex. issued May 29, '58. Returned Jan. 1, 1859. "Satisfied in part." R. Gregg's lot sold for $25 00. (Same lot as above.) Sold to H. N. Wead.

JOHN SLOAN *vs.* KELLOGG, MOSS ET AL. } Nov. 7, 1857. Dam., $1,602 43.
Sold.

Execution returned May 20, 1858. Satisfied in part. R. Gregg's lot sold for $25 00. (Same lot as above.) Sold to H. N. Wead.

H. N. WHEELER *vs.* KELLOGG, MOSS ET AL. } Nov. 12th, 1857. Dam., $338 99.

Execution *returned* July 12, '57. Returned Oct. 4, '57. "No property found."

W'M S. GREGGS *vs.* KELLOGG, MOSS ET AL. } December 8, 1857. Dam., $541 08.

Returned Sep, 1858. No property found.

W'm S. Gregg
vs.
Kellogg, Moss et al. } December 9, 1857. Dam., $538 90.

110 Returned June 1, 1858. Returned Sept. 1, 1858. "No property found."

Honerah Lawler
vs.
Kellogg, Moss et al. } December 12, 1857. Dam., $56 60.

Returned Mc'h 2, 1858. Satisfied.

L. B. Cornwall
vs.
Kellogg, Moss et al. } Jan. 4, 1858. Dam., $380 62.

Execution returned Nov. 17, 1858. No property found.

Henderson Sloan
vs.
Kellogg, Moss et al. } Jan. 6, 1858. Dam., $1,088 70.

Execution issued May 21, 1858. Returned July 29, 1858. "No property found."

Aqu'lla Moffitt
vs.
Kellogg, Moss et al. } February 2d, 1858. Dam., $477 16.

Execution issued Feb. 8, 1858. Returned July 9, 1858. "No property found."

111 W'm Scott et al.
vs.
Kellogg, Moss et al. } Feb'y 2, 1858. Dam., $879 16.

Execution issued Ap'l 20, 1858. Returned July 20, 1858. "No property found."

Lewis J. Hines
vs.
Kellogg, Moss et al. } March 3d, 1858. Dam., $267 97.

Execution returned Jan. 1, 1859. Satisfied in full.

Michael Donohue
vs.
Kellogg, Moss et al. } June 8th, 1858. Dam., $60 60.

"No property found."

112 *Deposition of R. Gregg.*

Deposition of Richard Gregg, taken February 17, 1860, before E. W. Smith, esq., commissioner, at Peoria, Illinois, in the cause in chancery in said court, of Edward Chase vs. W'm S. Moss et al.

Richard Gregg, having been by me first duly cautioned and sworn

to testify the truth, the whole truth, and nothing but the truth to the questions propounded by the receiver, did depose as follows, to wit:

My name is Richard Gregg; I reside in Peoria; I am carrying on distilling.

Int. 1st. Are you now, or have you been, interested in the firm of Kellogg, Moss & Co., or Moss, Harding & Co., and which of them?

Answer. I have been a member of both, and am still a member of Moss, Harding & Co.

Int. 2. Did Moss, Harding & Co. succeed to all the rights and interests of Kellogg, Moss & Co.?

Ans. I believe they did.

Int. 3. Who compose the firm of Moss, Harding & Co.?

Ans. Abner C. Harding, William Kellogg, James Knox, William S. Moss, and myself, I believe, were all.

Int. 4. What interest did you have in the firm of Kellogg, Moss & Co.?

113 Ans. My original interest was one-tenth, but afterwards we went on the pro-rata principle, every man interested in proportion to the advances he made.

Int. 5. When was the second arrangement, referred to in your answer, made?

Ans. I cannot tell the date. I think it was during the continuance of the firm of Kellogg, Moss & Co.

Int. 6. How much did you put into the firm of Kellogg, Moss & Co.?

Ans. I can't answer exactly, but it was about a hundred thousand dollars; I had vouchers for $95,000 or $98,000, without counting interest.

Int. 7. Was the amount you put in the firm paid in cash, or how otherwise?

Ans. All cash, I believe.

Int. 8. Have you ever put anything into either of said firms beside what you have mentioned in your previous answer?

Ans. I have not; I have loaned the company seven mortgage bonds, for which they are indebted to me; I hold the company's note for $1,476 94 besides.

Int. 9. How much did the other members of the firm contribute, each of them, if you can state?

Ans. I cannot tell; I do not know.

114 Int. 10. Have you received from the company any mortgage bonds or other assetts?

Ans. I have never received anything from the company, but have been broken up by them.

R. GREGG.

Subscribed and sworn to before me this 17th day of February, A. D. 1860.

E. W. SMITH,
U. S. Commissioner.

115 *Testimony of F. M. Adams.*

F. M. ADAMS, examined by the plaintiff.

Am a phonographic reporter; I took the testimony of Mr. Moss on a former trial; I dictated the whole testimony from my notes to a person who wrote it down. That is a correct transcript.

Testimony of W'm Davis.

W'M DAVIS, examined by the plaintiff.

I furnished a copy of Moss testimony taken on the April trial; I was the reporter and dictated that copy from my notes. It is a correct copy.

Plaintiff rests.

And the defendant, further to maintain the issues on his part, introduced the following testimony:

Testimony of W'm S. Moss.

W'M S. MOSS, the defendant, being duly sworn, testified as follows:

I was in court when Mr. Gregg was recalled in relation to the statement that he made in the funding matter. I heard him testify as to having informed me of the amount of the claim he funded. He told me that he put into the concern from $95,000 to $98,000 without the interest. He told me that some time after it was funded. I did not see a statement that he had made in writing at that time. His claim was funded by a man named Follansbee. Which was all the evidence offered by either of said parties.

The court then gave to the jury the following charges and instructions:

Charge to jury.

This is an action by the plaintiff to recover of the defendant ten thousand dollars which he claims to have advanced (to one Kellogg & Mr. Moss on the 23rd of December, 1865.) It is alleged on the part of the plaintiff that, on and for some time before and after the 23rd December, 1856, there existed a business firm in Peoria, in this State, by the firm-
name of Kellogg, Moss & Co., of which the plaintiff and de-
117 fendant and one William Kellogg, with several other persons, were
members; that, on the 23rd day of December, 1856, said firm had drafts maturing on the 24th of December, the next day, to the amount of ten thousand dollars (in St. Louis,) upon which one Elder was an accommodation endorser; that, on the 23rd of December, (1856,) Elder called on Kellogg, who was the financial (and active) member of said firm, for funds with which to meet the drafts maturing the next day; that the firm not having the money, Kellogg and Moss united in a letter addressed to the plaintiff, Gregg, (the letter which was introduced in evidence and which you have all examined,) by which they promised, if the plaintiff would furnish two drafts of $5,000 each, at sixty days, they would see him paid. That, upon the faith of the promise contained in this letter, he, the plaintiff, advanced to Kellogg and Moss the sum of $10,000. There is some conflict of testimony as to whether the proposition contained in this letter was accepted and the money paid by Gregg or not;
upon this question of fact you are the judges. But if you shall be
118 satisfied, from the evidence, that Gregg did advance the money on
this letter, as he says, with the distinct understanding that Kellogg and Moss should be individually liable therefor, as alleged, then I am of opinion he can maintain this action for it. Kellogg & Moss might have made themselves individually liable to pay this money, although it was really obtained to pay a debt of the firm. It is for you to say whether

they did so. If they promised to be individually responsible for the amount obtained they are liable on such promise. It is objected on the part of the defendant that the letter only asks for drafts and that the plaintiff must show a literal compliance with the terms of the letter before he can recover, that is to say, he cannot, upon a request to furnish drafts, furnish money instead of drafts and hold Moss for the money. But the court is of opinion that the payment of money is a substantial compliance with the request contained in the letter. The object of the letter was to obtain funds to meet the drafts maturing the next day, and it seems to me too strict and technical a construction to insist that the plaintiff cannot recover on this letter because he paid money
119 instead of drafts, the money having been accepted by one of the joint promissors in the letter. This is substantially the plaintiff's case, and if you are satisfied, from the evidence, that Gregg did advance the money in question on the faith of the individual promises of Kellogg and Moss, contained in their letter, the court instructs you, as a matter of law, that such facts make out a case for the plaintiff, and he will be entitled to a verdict at your hands, unless you shall be satisfied that the defendant has made out the defence set up. But you must be satisfied, from the evidence, that plaintiff paid the same on the credit of Kellogg and Moss, and not as an advance to the firm of which they were all members. The defence is substantially (in addition to the denial of plaintiff's case, which is involved in the plea of general issue which puts the plaintiff on proof of his case) that, on the first of December, 1857, an agreement was entered into between the members of the old firm of Kellogg, Moss & Co., and certain other parties, among whom was Gen'l A. C. Harding, by which it was agreed that the moneys theretofore advanced by each member of the firm of Kellogg,
120 Moss & Co., and put into its capital stock, should be funded and provided for as particularly set forth in the agreement; that is to say, whatever money had been put in as capital stock, or by way of advancement to the firm, by each individual member thereof, should be funded, and that the plaintiff, at the time of becoming a party to this agreement, agreed that this sum of $10,000, which he had advanced for the purpose of paying Elder for the purpose of meeting drafts in St. Louis, should be considered as part of the capital put into the firm by Gregg, and funded by him in the manner provided in the contract. There can be no doubt that this $10,000, if advanced by Gregg on this letter of Kellogg & Moss, was money paid for the use of said firm of Kellogg, Moss & Co., and which he was entitled to treat at least in equity as a debt against said firm. The letter explains the transaction in that regard very fully, so that there is no mistake or escape from it. Whatever funds were advanced on that letter were to be advanced for the purpose of paying liabilities of the firm of which Gregg was a member. It was an advance to meet an indebted-
121 ness of the firm to protect its commercial honor, & although Kellogg & Moss may have made themselves personally liable to pay the money within sixty days to Gregg, yet Gregg was at liberty to deem the firm also liable for it, especially if not paid within sixty days. If they made default, did not make payment or cause it to be made within sixty days, he might say that, having gone to increase the assets of the firm, the firm was liable as well as Kellogg and Moss for the payment of the money. Gregg, the plaintiff, has his election to hold the firm as well as Kellogg & Moss, to consider it as capital put with the firm by himself.

And to the foregoing charge of the court relating to the right of Gregg to have his election to hold the firm as well as Kellogg & Moss, the plaintiff, by his counsel, then & there excepted. & the court continued its charge as follows:

It was also competent for Gregg to release or waive his claim against Kellogg & Moss for the payment of this $10,000 and rely solely on the firm for his readvancement, or upon any agreement which the firm might make for reimbursement to the members thereof for
122 the capital they had put in.

The agreement of December 1st, 1857, is between the members of the old firm of Kellogg, Moss & Co., and certain other parties, by which it is substantially agreed that the old members of the firm of Kellogg, Moss & Co., should fund their respective advances to the old firm. The amount which each member of the old firm was thus to have funded to be made up from a statement or vouchers to be made and furnished by each member of the old firm of the cash advances made by them respectively. Having a right to treat this $10,000 as a part of his advances to said firm, it is for you to say, under the evidence, whether the plaintiff did so or agreed to do so.

And to the foregoing part of the charge which says that Gregg had a right to treat the $10,000 as a part of his advances to the said firm, the plaintiff, by his counsel, then & there excepted. And the court continued its charge as follows:

By the agreement of December 1st, 1857, the new firm not only assume to pay the outstanding liabilities of the old firm of Kellogg,
123 Moss & Co., out of the earnings of the Peoria & Oqua'ka Railroad, but also to pay in their order future advances, the operating expenses and funded capital of the members of the old firm of Kellogg, Moss & Co. And this undertaking on the part of the new firm is a sufficient consideration to sustain the agreement to treat this $10,000 as a claim against the old firm instead of a claim against Kellogg & Moss individually.

And to the foregoing part of the charge, saying that "this undertaking, on the part of the new firm, is a sufficient consideration to treat the $10,000 as a claim against the old firm instead of a claim against Kellogg & Moss individually," the plaintiff, by his counsel, then & there excepted. & the court proceed with the charge as follows:

If, therefore, the evidence in the case satisfies you that Gregg, at the time the agreement of the 1st of December, 1857, was made, assented to treat this $10,000 as a part of his advances to the firm of Kellogg, Moss & Co., & to have the same funded, as contemplated in said agreement, such assent on his part is binding upon him, and releases Kellogg & Moss from their promise to pay the said sum or see the same paid.
124 It is a substitution of the liability of the new firm to ultimately reimburse this amount as a part of the capital put into the old firm by Gregg for the individual liability of Kellogg & Moss to Gregg. But it is for you to say, under the evidence, whether such assent or agreement to fund was, in fact, made or not. If made, the defence is made out.

And to the foregoing part of the charge of the court relating to the effect of Gregg's assent to treat the $10,000 as having been funded, & thereby releasing Kellogg & Moss from their promise to pay said sum,

the plaintiff, by their counsel, then & there excepted. And the court proceeded with the charge as follows:

If not made, that is to say, if Gregg did not assent thus to fund this specific sum of $10,000, and agree that he would treat this $10,000 as a part of his capital, then it is otherwise.

Nor is it material whether the plaintiff afterwards included this amount in his statement of advances to the old firm or not. It is enough if you should be satisfied that he agreed to do so. Granting that Kellogg & Moss were liable to make it good to him in December, 1857, still,
125 if Gregg agreed that the sum for which they were so liable should be carried over to his capital stock with Kellogg, Moss & Co., then the agreement is binding on the plaintiff, because this sum had already clearly been put into the affairs of the firm, and either the plaintiff or Kellogg & Moss were entitled to have it charged up as part of the assets furnished & sunk in the past business of the firm.

And to the foregoing part of the charge of the court, holding that it was not material whether the plaintiff afterwards included this amount of $10,000 in his statement of advances to the old firm or not, the plaintiff, by his counsel, then & there excepted. & the court proceeded with the charge as follows:

If the plaintiff agreed to charge it with his account against the firm, he thereby put Kellogg & Moss at rest in regard to this claim, and cannot now set up his failure or neglect to put this claim into his account as a reason to recover in this case. It is his own fault if he did not include this item in his account to be funded against the old firm, and he cannot take advantage of his own neglect in this particular. If
126 he made a mistake in this regard, the defendant cannot be held liable for that mistake in this action. If they (Kellogg & Moss) had understood their liability still existed on this letter, they might have taken action themselves to have had the claims provided for, and funded to their credit among the accounts of the old firm.

And to the foregoing part of the charge, holding that it is the plaintiff's own fault if he did not include this item in his account to be funded against the old firm, & as to the defendant's right to regard himself as put at rest as to said claim, the plaintiff then & there excepted. & the court proceeded in its charge as follows:

Nor is it your or my province to go into an inquiry as to the fairness of this contract of the 1st of December, 1857. The firm of Kellogg, Moss & Co. was then conceded to be seriously embar'assed, if not insolvent. Other parties proposed to come in and take charge of the affairs of the firm. Some of the old partners chose to step out, and take bonds of indemnity against the liabilities of the old firm. The terms upon which all this should be done were agreed upon, and their fairness or unfairness is not involved in any inquiry that we are to
127 make. There is one point, and that is as to interest, upon which no question has been made. If you find for the plaintiff, he is entitled to interest on the claim from the time that he made his advances; if not, you will simply say, you find for the defendant.

Which was the whole of the charge in the case. The jury thereupon returned a verdict for the defendant, as follows.

(Said verdict is correctly copied on page 38 of this record. W'm H. B., cl'k.)

128 Whereupon the plaintiff moved the court for a new trial, as follows:

Motion for new trial.

In the circuit court of the United States for the northern district of Illinois.

RICHARD GREGG
v.
WILLIAM S. MOSS.

And the said plaintiff moves the court to set aside the verdict in this case, and for a new trial, and for cause thereof, shows to the court here the following reasons:

First. The court excluded competent and relevant evidence offered by the plaintiff.

Second. The court admitted incompetent evidence on the part of the defendant against the objection of the plaintiff.

Third. The court erred in giving the jury certain instructions against the plaintiff's objection.

Fourth. The verdict is against the law.

Fifth. The verdict is against the evidence.

Sixth. The plaintiff has discovered new evidence as hereinafter set forth.

Wherefore for these and for other reasons the plaintiff prays that the verdict heretofore rendered may be set aside & a new trial be had.

OBADIAH JACKSON,
Attorney for Plaintiff.

(Endorsed.) Filed March 5, 1870. W'm H. Bradley, cl'k.

129 Which motion the court overruled; and to which ruling the plaintiff then & there excepted; & the court rendered judgment for the defendant on said verdict.

And because the foregoing matters & things do not appear in the record, the plaintiff has tendered this his bill of exceptions and asked that it be sealed & made a part of the record, which is done.

H. W. BLODGETT, [SEAL.]
Dist. Judge Dist. N. Ills.

(Endorsed:) Filed March 19, '70. W'm H. Bradley, cl'k.

130 On this day, to wit, the 27th day of June, A. D. 1870, came said plaintiff, by his attorneys, and filed in said clerk's office his appeal bond in said entitled cause, which bond is in the words and figures following, to wit:

Appeal bond.

In the Supreme Court of the United States. In error.

RICHARD GREGG
vs.
WILLIAM S. MOSS.

Know all men by these presents that we, Richard Gregg and Oba-

diah Jackson, of Chicago, Illinois, are held and firmly bound unto the above-named William S. Moss, in the sum of one thousand dollars, to be paid to the said William S. Moss, his executors or administrators; to which payment, well and truly to be made, the said Richard Gregg and the said Obadiah Jackson, bind ourselves, jointly and severally, firmly by these presents. Witness our hands and seals, this 27th day of June, A. D. 1870.

131 The condition of the above obligation is such, that whereas the above-named Richard Gregg hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the circuit and northern district of Illinois: Now, therefore, if the said Richard Gregg shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

RICHARD GREGG. [SEAL.]
OBADIAH JACKSON. [SEAL.]

Approved:

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed June 27th, '70. W'm H. Bradley, cl'k.

132 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in said entitled cause, wherein said Richard Gregg is plaintiff, and William S. Moss is defendant, as the same remains of record in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court at my office in the city of Chicago, in said district, this third day of December, A. D. eighteen hundred and seventy, and of our independence the ninety-fifth year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

[5-c't int. rev. stamp, affixed and canceled.]

133 Circuit court of the United States for the northern district of Illinois.

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Richard Gregg, plaintiff, and William S. Moss, defendant, a manifest error hath happened to the great damage of the said Richard Gregg, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington,

134 on the first Monday of December next, in the said Supreme

Court to be then and there held, that, the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this twenty-fifth day of March, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fourth year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

135 (Indorsed:) Circuit court U. S., northern district of Illinois. Richard Gregg vs. W'm S. Moss. Writ of error.

136 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To WILLIAM S. MOSS, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, in the District of Columbia, on the first Monday of December, A. D. 1870, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the seventh circuit and northern district of Illinois, wherein Richard Gregg is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

137 Witness the Honorable Henry W. Blodgett, judge of the circuit court of the United States for the seventh circuit and district of Illinois, this 10th day of January, A. D. 1870.

H. W. BLODGETT, *Judge.*

Received a copy, and accept service, this 10th June. 1870.

GEO. P. HARDING,
Att'y for Defendant in Error.

(Indorsement on cover:) No. 393. Richard Gregg, plaintiff in error, vs. William S. Moss. N. Illinois C. C. U. S. Filed 12th December, 1870.

SUPREME COURT OF THE UNITED STATES.

December Term, A. D. 1871.

RICHARD GREGG,
Plaintiff in Error.

vs.

WILLIAM S. MOSS,
Defendant in Error.

No. 185.

POINTS FOR PLAINTIFF IN ERROR.

Printed by the CHICAGO LEGAL NEWS Company, 15 North Jefferson St.

Supreme Court of the United States.

DECEMBER TERM, 1871.

RICHARD GREGG
v.
WILLIAM S. MOSS.

In error from the Northern District of Illinois.

POINTS FOR PLAINTIFF IN ERROR.

Page of Printed Record.

This was an action of assumpsit on the common counts
2 by plaintiff in error against defendant in error, as survivor of Wm. Kellogg, commenced March 16, 1868, to recover the sum of ten thousand dollars, loaned by plaintiff to defendant and said William Kellogg Dec. 23, 1856, with the interest thereon.

Four trials were had: the first resulted in a verdict for
8 plaintiff for $17,112$^{38}_{100}$. In the second the jury disagreed;
10 on the third the jury found for the plaintiff $17,350; on
12 the fourth trial the jury, under the instructions of the

court, found for defendant. The motion for a new trial was overruled *pro forma*, and the plaintiff brings the record here to correct the errors claimed to have intervened in the rulings and instructions of the District Judge on the last trial.

The statute of limitations was pleaded, but as it appeared the defendant left the State of Illinois (where the debt was contracted, and where all of the parties then lived) shortly after that event, and has ever since then lived, and still does live in California, and had only returned from there and been in the State of Illinois a few days at the time of the commencement of this suit, no substantial point was made on that plea; in fact it was abandoned by the defendant.

It also appeared that the co-contractor with the defendant, (Mr. William Kellogg,) died soon after the loan of the money, absolutely insolvent, so that the whole controversy was between Gregg and Moss. The proof shows that during the year 1856, the plaintiff and defendant, together with Kellogg, the joint promisor, and some other persons, were engaged under the name of Kellogg, Moss & Co., as contractors, in building a railroad called the Peoria and Oquaka Railroad, running from Peoria to Galesburg in Illinois; that it was technically a partnership, but that the whole business was managed by Kellogg and Moss, who made all the contracts and devoted their time to it: that Gregg simply contributed a proportion of the capital stock but took no part whatever in the business, being all of the time engaged in private matters of his own. It also

appeared that Gregg had, long previous to the loan of the money in question, contributed all of and much more than his share to the capital stock of said partnership, and that although said firm of Kellogg, Moss & Co. was a legal partnership, it was managed by Kellogg and Moss with the attributes of a railroad corporation.

I.

The proof shows that on the 23d day of December, 1856, the defendant, Moss, and the said William Kellogg signed and caused to be delivered to the plaintiff, Richard Gregg, the following letter:

15 "PEORIA, Dec. 23, 1856.

"RICH'D GREGG, ESQ.:

"*Dear Sir:* Mr. Elder is here and wants to take the "funds with him to pay drafts due to-morrow. It is not "right that he should be forced to pay this money for our "accommodation. If you will send us two drafts at 60 "days, $5,000 each, we will return you the money before "the expiration of the 60 days. It must be done, as we "cannot get along any other way. Mr. E. wishes to leave "in the cars.

"Yours truly,

"WM. KELLOGG,
"WM. S. MOSS."

16 The plaintiff identified the letter and signatures, and testified that Kellogg brought it to him on the morning of its date, at about 11 o'clock, at his distillery office in Peoria, "and that upon that letter and his, Kellogg's, "entreaties, I gave him—as I recollect now—it is a long "time ago, and my papers were all burned up twice since

"—a package of currency of $5,000, and local paper to "the amount of $5,000. I either gave him a draft of my "own, or accepted his draft, 30 or 40 days. It was Peoria "paper of some kind. I am pretty positive about the cur- "rency. I took up the local paper afterwards. I advanced "$10,000 to Kellogg that day on that letter. Mr. Kellogg "told me in the morning also, when he came into my "office, what he wished to do. This has never been paid "—not a cent of it."

18 The plaintiff next proved by J. E. Elder, the person referred to in the foregoing letter, that he was in Peoria on the 23d of December, 1856, and did not get any money from Kellogg, Moss & Co., *but that he did get* $7,500 *in*
19 *drafts from William Kellogg*; that he wanted $10,000, and Kellogg raised him $7,500.

21 The plaintiff, in order to prove that Elder had received the proceeds of the money furnished by Gregg upon the letter in question, then called as a witness E. F. Nowland, who testified that "I knew Elder; saw him in Peoria about "Dec. 23, 1856; I think he went away that night or the "next day; I did not see him the next morning; I saw "Kellogg in the morning at about eight or nine o'clock, "*and also immediately after dinner;* Capt. Moss lived about "a mile from the hotel; I suppose it was about one o'clock "that I got to Mr. Kellogg's office.

22 The plaintiff then offered to prove by this witness *that only a few moments after Kellogg had obtained the* $10,000 *of Gregg, he told the witness that he had received the money from*

Gregg, and had fixed Elder off, and that Elder had gone home, which evidence was excluded by the court under exceptions by plaintiff.

We insist that this ruling of the court was erroneous, because we had a right to prove the admission of one of the joint promisors as to the receipt of the money, made at about the time of or immediately after the transaction took place.

It was a declaration by Kellogg against his interest, and certainly was valid to hold him; then why should it not be received against his co-promisor Moss, to prove that what Moss actually requested and directed Gregg to do, he in fact did. The record shows—and as to this there was no dispute—that Kellogg was the sole acting and managing man for all of the partners in this railroad enterprise; that he was the only one of the partners who could have "fixed Elder off," as he expressed it, and for that reason aside from the peculiar nature of this transaction, it was competent to prove Kellogg's admission that he received the money in question, even after the loan had been completed.

It may be said that this testimony was not required to fix Moss's liability as to the receipt of the money; but this is not true, except inferentially. We proved, 1st, the letter and signature of Moss; 2d, the receipt of it by Gregg on the same day; 3d, the payment of the money and drafts on the strength of it to Kellogg; and, 4th, by Elder, that he received a large amount of money and

drafts, he thinks ($7,500), from Kellogg on that day. Now, if we had further proved that Kellogg received the money which he paid to Elder from Gregg, the plaintiff, it would furnish all the links required by the letter to make the liability of Moss absolute and unqualified, and this we could have done by showing Kellogg's statement, made immediately after the transaction, that he had received the money from Gregg, and had fixed Elder off, etc.

It was necessary to a complete proof of our case to show a full compliance with the terms of this letter.

In this connection, special attention is called to the testimony of Moss, the defendant, who tries by every means to avoid the responsibility of his authorship of the letter. He says: "I have seen this letter before. Kellogg brought
22 "it to me the day it is dated, I think Dec. 23d, 1856. I "was up at my farm on the bluff making some fence, I "think, when he brought it to me. I signed the letter and "handed it to Mr. Kellogg. *I did not authorize him to pre-* "*sent that letter to Mr. Gregg;* to deliver it to him. I di- "rected him to show it to Mr. Gregg, and if he got the "drafts, that this letter was to go with the drafts."

This extraordinary statement of the defendant, is cited not to ask your honors to examine the evidence, but to show that he insists on a literal compliance with the terms of the letter, and for that reason we should have been allowed to prove that Elder did receive the identical money obtained from Gregg by Kellogg on the faith of the

letter, notwithstanding Moss says he did not authorize him to present the letter to Gregg.

The evidence rejected by the court, if admitted, would have proved that Kellogg had received the money from Gregg and paid it to Elder; this was what the terms of the letter required, and on Elder's receiving it the contract on the part of Kellogg and Moss to repay or return it before the expiration of sixty days would have been complete. On what principle of law can its rejection be sustained?

At the time of making the admission Kellogg was equally liable with Moss, and a suit would have to have been against both, it was not a statement of any new matter but an acknowledgment by Kellogg that what had been sought by the letter had been accomplished, and all parties agree that Kellogg was the active man of the firm —the one whose duty it was to accomplish it.

Greenleaf on Evidence, Vol. 1, § 174, says:

"But in the absence of fraud, if the parties have a "joint interest in the the matter in suit whether as plain- "tiffs or defendants, an admission made by one is in "general evidence against all." * * * * "And "where two were bound in a single bill the admission of "one was held good against both defendants."

Lowle v. Boteler, 4 Har., and McHenry 346.

In Buckman v. Killinger, 55 Pen. Stat., 416, the suit was against one of the sureties on a bond in favor of a woman who had separated from her husband, the husband

being the principal on the same bond, but was not a defendant to the suit. The defense was, that the bond had been given by the wife to her husband, but the court admitted as evidence against the surety, the parol declaration of the husband, made some time previous, that the bond belonged to his wife, and the supreme court affirms this ruling on the ground that the declaration of the husband was evidence against himself.

Entries in partnership books in the regular course of business, during the continuance of a firm, by either of the partners or their authorized clerks, are admissible evidence against and bind all partners.

Tucker v Peaslee, 36 N. H., 167.

In Massachusetts the law has long been settled that the parol admissions of one partner, *even after dissolution*, are competent to bind the other partners.

Cady v. Shepard, 11 Pick, 400.

In the above case the court quotes (p. 406) with approbation, the rule stated by Lord Mansfield in Wood v. Braddick, 1 Taunton, 103: "The admission of one "partner, made after the partnership has ceased, is not "evidence to charge the other in any transaction which "has occurred since their separation; *but the power of part-* "*ners with respect to rights created, pending the partnership,* "*remain after dissolution.*"

The court in Cady v. Shepard, further add, (p. 403): "But that the confession of any one of the defendants, in

"an action against several on a joint contract, may be "given in evidence against them, the joint contract being "first proved *aliende*, cannot, we think, be reasonably "doubted."

The same rule is stated in Bridge v. Gray, 14 Pick., 61, where Shaw, C. J., says: "The court are of opinion that "this evidence was admissible. It must be considered as "a general rule, that upon each joint contract the admis- "sion of each joint debtor, as to the existence, payment, "and settlement of the joint debt, is admissible to bind "the joint debtor; and for many purposes the character "of joint debtor being once established, must be deemed "to continue until the debt is paid, or by some other "means legally cancelled, barred or discharged."

"This case is entirely distinguishable from that of the "acknowledgement of one partner after a dissolution, "taking a case out of the operation of the statute of limit- "ations. To produce this effect the law requires proof "of a new promise within six years, and an admission is "only evidence from which a jury may infer such new "promise. Now it may be well argued (of this however "we give no opinion) that the power of binding partners "by a new promise, does not exist after a dissolution by "which the mutual powers of partners to bind each other "by contract has been revoked; and yet, that after a joint "liability has been shown, each may make binding "acknowledgements and admissions, as evidence affecting "the existence of that joint liability."

See also Vinal v. Burrill, 16 Pick., 401.

The rule is different in New York, and perhaps in some other States, but we submit that the above cases are founded on the best reasoning and ought to be followed.

The defendant on the trial below cited a large class of cases—I can not state them now owing to the destruction of all of our libraries by the Chicago fire—in opposition to the competency of this testimony; but, as I remember, they were of that class where, after the statute of limitations had barred the debt, the admission of one co-defendant was held insufficient to take it out of the statute as to the other defendants. This is simply on the ground that the debt having once become extinct as to all, it can not be re-created as to all, except by the consent of all. Though usually treated as a question of evidence, it really involves the right of one party to *make* a debt against another without his consent. This can not be done. But the distinction between that and the present case is too obvious to require illustration.

Thus Bell v. Morrison, 1 Peters, relied on by the defendants, is a case of that class. Judge Story says, p. 373, "The light in which we are disposed to consider this "question is that, after a dissolution of a partnership "no partner can create a cause of action againt the other "partners except by a new authority communicated to him "for that purpose. It is wholly immaterial what is the "consideration which is to raise such cause of action, "whether it be a supposed pre-existing debt of the part-"nership, or any auxiliary consideration which might "prove beneficial to them. Unless adopted by them,

"they are not bound by it. When the statute of limita-
"tion has once run against a debt the cause of action
"against the partnership is gone. The acknowledgment
"if it is to operate at all, *is to create a new cause of action*
"*to revive a debt which is extinct*, and thus to give an action
"which has its life from the new promise implied by law,
"from such an acknowledgment, and operating and
"limited by its purport. *It is then in its essence the creation*
"*of a new right, and not the enforcement of an old one.*"

II.

The defense to this action was, to say the least, of a very shifting and contradictory nature.

First. It was sought to prove that Gregg never did advance the money in question at all—that, in fact, nothing was paid by Gregg on the faith of the letter to him from Kellogg & Moss, and it was in this view and to meet this theory that we offered to prove by Knowland the admission of Kellogg that the money had been received by him from Gregg.

Another theory was then set up, to wit: Admitting that the money had been received, but that Gregg had subsequently funded his claim for it, and let it form part of his assets or interest in the firm of Kellogg, Moss & Co., and receive a corresponding interest in the new firm of Moss, Harding & Co. when that firm was reconstructed on the ruins of the old firm in 1857.

The attempt to make proof that any such funding of this claim actually took place signally failed, and as the defendant had possession of the books and vouchers of Kellogg, Moss & Co., if it had been so funded, he could
35 easily have shown that fact, but Gregg swore positively that no agreement to that effect was made, that he always refused to so fund it, and that no such funding ever took place. This testimony was uncontradicted, though Harding swore that an agreement was made to fund it, and this was all of the evidence on that subject. He (Harding), the defendant's principal witness, did not claim that it was in fact funded, but only that Gregg agreed that it should so be funded.

It appeared that in December, 1857, about a year after the loan of the money in question, the firm of Kellogg, Moss & Co. was reorganized and changed by the retiring of some partners and the admission of Mr. Harding to the firm of Moss, Harding & Co. At that time an agreement was entered into between the members of the old firm of Kellogg, Moss & Co., by which they agreed to make a statement of the cash paid and advances made to said firm of Kellogg, Moss & Co., which amounts, when adjusted, should remain as capital stock of said firm, and represent the capital stock of each respective member in said new firm. This agreement was signed by all of the members of the old firm, including Kellogg, Moss and Gregg. It was offered in evidence by the defense, and, so far as relates to this question of funding, is as follows:

23 "This agreement, made this first day of December, A.D.

"1857, by and between the respective partners of the firm "of Kellogg, Moss & Co., whose names are subscribed "hereto, witnesseth that, whereas, the subscribers have "heretofore been doing business as lessees and contractors "of the Peoria and Oquaka Railroad Company, as "co-partners, under the name and style of Kellogg, Moss "& Co., by the terms of which said copartnership the "capital stock of said company was fixed at the sum of "three hundred thousand dollars; and, whereas, some of "the members of said firm have advanced moneys or "funds *to said firm* beyond the amount of their proportion "as fixed by the said capital stock;

"Now, therefore, it is agreed as follows: First. That "each and every member of said firm shall make a state- "ment *of cash paid and advancements made to said firm*, "together with ten per cent. interest from the date of each "payment; said accounts to be made up to the date of "this instrument, and the accounts so rendered and agreed "upon, after all fair charges, set-offs and deductions are "made, shall, after this date, remain as capital stock of "said firm, and represent the capital stock of each indi- "vidual member in said firm at this date, and shall fix "and determine their interests therein respectively and *pro* "*rata*."

This was all of the funding agreement bearing on the controversy involved in this suit. The various members of the firm, including Gregg, in due time made their statements and funded their advances as provided in said agreement, but the evidence is positive that Gregg did not, in his statement, include the $10,000 involved

in this suit in that statement, and that, in fact, he received no credit therefor from the firm, and never made any claim to the firm for it.

35 He testifies: "I never funded this debt in the world, and "am very positive that I never had any conversation "about funding it. It was agreed that each partner "should make a statement of his account. I did make "out a statement, and filed it with the auditor of the "Company. The statement was made as far as I know, "and it was the intention to make it in accordance with "the agreement. *The amount I advanced to Kellogg on that "letter of Kellogg and Moss, was not included in that account.* "* * * * * *My statement was received as satisfactory,* "*and their books were made to correspond with my account.*" No evidence was offered by the defense to contradict the testimony. It stands, therefore, as true, and establishes the fact that Gregg never did receive any credit or allowance from the company, for this sum of $10,000 advanced to Kellogg in the faith of the letter in question; in fact, the defense did not attempt any proof that he had received such credit.

After the introduction of the funding agreement however, the defense sought against our objection to prove that it was verbally understood that this sum so advanced should be treated by Gregg as part of the money contributed by him to the firm of Kellogg, Moss & Co.; this evidence was admitted subject to plaintiff's objection, and is the second error assigned in this record.

22 Moss then testified, subject to objection, that pending the negotiation which ended in the execution of the funding agreements, "Gregg was was willing to go into the "arrangements, if the new firm would assume that $10,000; "that Gregg objected to signing unless the company "would assume that debt, and Gen. Harding told him "that he would not go into the company with them, *unless* "*every man that had a debt against the company would fund it.*"

If the witness, (the defendant Moss) here referred to the $10,000 involved in this suit, he certainly makes a very contradictory statement to that made in his cross-examinations, where he says: "I did not understand that this,
27 "(meaning the money advanced in the letter) was an "advance to the company on the part of Gregg."

We insist that the testimony as to what was said about this $10,000 at the time of signing the agreement, was incompetent, because, 1st, it tended to vary the written agreement itself; 2d, it does not appear with sufficient certainty that this sum was referred to; and, 3d, it is irrelevant and immaterial, unless followed by proof that Gregg did actually include that sum in the funding, which is not even pretended by the defendant to have been done; on the contrary, the proof already quoted shows that he did not so fund it.

It does not appear with sufficient certainty that this sum now in dispute was the same referred to by the witness, in the conversation Gregg is said by them

to have had at the time of signing the funding agreement.

The only witnesses as to Gregg's agreement are the defendant, Moss, and Gen. Harding, who was really a co-defendant, being liable, as he says, for one-quarter of it.
31 He says: "When this suit was brought I had no earthly "interest in it. Subsequently I made an agreement with "captain Moss that if he was beaten I would pay a "quarter of it," etc.

There is nothing in Mr. Harding's testimony to show that this sum loaned by Gregg to Kellogg and Moss, was referred to in the conversation at the time
30 of signing the agreement. He says: "I remember of "no distinct date except when the instrument was executed. * * * On that day the subject of conver- "sation was the funding of all claims which the partners "had *for advancement made to the company of Kellogg, Moss & "Co.* * * * Captain Moss was very reluctant to fund "the large advance he had made, and Mr. Gregg was "reluctant too, and complained that he couldn't spare so "much money from his private business. I remember "that he said he had been induced to give drafts on Ewing "to pay Elder, which he had been compelled to take care "of, etc. He stated the amounts of those drafts at "$10,000. I understood that there were two of them, "which Kellogg or Kellogg and Moss had promised to "take care of and had failed to do so, that he was com- "pelled to. He wanted the new firm to assume these claims "and I objected."

This is the substance of Harding's testimony, and admitting its competency, does not fix the identity of the $10,000 in dispute in this suit as the same referred to, but proves directly that it must have been another claim, because Gregg testifies (and on this he is uncontradicted) that the funds advanced by him were
16 made up of $5,000 currency and $5,000 local paper — Peoria paper of some kind. This did not include any drafts on Ewing which Gen. Harding says is the matter referred to by Gregg at the time of signing the agreement, and seems conclusive that if Gen. Harding is to be believed, the matter referred to then was distinct and different from the sum now in dispute. Gen. Harding could not have had from his stand-point, any interest in this claim at that time; this was an individual debt from Kellogg and Moss to Gregg, loaned by Gregg to them on their individual credit; not contributed to the firm of Kellogg, Moss & Co., either as capital or a loan — the proof shows that he, Gregg, had before this contributed more than his share of the capital stock to that firm; that it was largely indebted to him; that he positively refused
16 to either loan or contribute another dollar to that firm, and that he did loan this sum to these gentlemen, Moss & Kellogg, on their individual credit. It is probable that it was obtained by them for the use of the firm, but they were under no obligation whatever as between themselves and Gregg to use it in that direction. They could have applied it to their own private business with perfect impunity, it was simply a private matter between Gregg and them.

Gen. Harding, it appears, was about entering into the new firm, and he very naturally did not want the individual members withdrawing capital from it for debts which the old firm may have owed them, and so far as Gregg, or any of the other members had such claim, it was his interest to see them funded, but he had no interest in compelling Gregg and Moss to settle their own respective liabilities. Whether Gregg owed Moss, or Moss owed Gregg, was, so far as the partnership was concerned, of no interest to him.

Moss also fails, although testifying with much bitterness against the plaintiff, to identify this $10,000 in dispute as the same under discussion at the time of signing the
24 funding agreement. He says, "Pending the negotiation "which ended in the execution of this paper, there was "conversation in my hearing between Gregg and others "in relation to being parties to this instrument. Gregg "was willing to go into the arrangement if the new firm "would assume that $10,000. * * * * * Gregg "objected to signing this unless the company would "assume that debt, and Gen. Harding told him that he "would not go into the company unless every man that "had a debt against the company would sign it. * * * * "*He said it was for drafts that he had paid. I think he paid* "*one of them in April and one in June.* He said he had "loaned them *to the company* to pay Elder off."

Even if such an agreement had been made between Harding, Kellogg & Moss and Gregg, it would not have been binding on the other partners who signed that agree-

ment, which was executed in addition to the above persons by C. S. Clark, H. Lightner, James Knox and P. B. Roberts. There is no evidence, either parol or written, to show that any one of these last-named persons knew of or assented to this alleged proposal of Harding that Gregg should fund this sum. If they had known of it, they might well have objected, and yet the theory of Moss & Harding's testimony would be to make them all assume this debt which at that time only Kellogg & Moss were holden to Gregg.

It cannot be claimed that on the face of that agreement, as it reads, Gregg had any right to fund this sum of $10,000, or to treat it as part of his claims against the partnership. He had previously refused to advance any more to the moribund concern, and as he says, and as the letter shows, only advanced this on the faith of Kellogg & Moss' individual responsibility. Having made his election and loaned them individually this money, and they having become responsible to him for its payment, he certainly could not turn around and say to Clark, Lightner, Knox, Roberts, and the other partners, "I elect now to put this in as a debt against the firm; you, too, are holden to me for it." And yet Mr. Harding would have us believe that he made such a verbal agreement outside of this written agreement at the time the latter was signed, which is to be binding on these other parties, although he, Harding, was not a member of the old firm, and had no power to act for it.

On the same principle he might have bargained with

Lightner or Knox to include the debts of Gregg to them in the same funding agreement; and where would it have ended?

No better illustration of the value of the rule against varying or adding to written evidence by parol can be given than is here presented, for, if followed to its extreme latitude, the enlargement of the funded debt by the addition of the different members' private claims against each other could have proceeded without limit.

The rule, as stated in the text-books, is, that "parol "contemporaneous evidence is inadmissible to contradict "or vary the terms of a written instrument," 2 Philips' Ev., 753; or, as Greenleaf puts it, Vol. 2, § 282, "the rule "excludes parol evidence of the parties contradicting, vary- "ing or adding to that which is contained in the written "instrument."

The testimony of Moss and Harding offered as to the including of this $10,000 in the funding agreement violates all of these rules. That agreement provided that the partners should make a statement of and fund all advances, etc., "*to said firm*," and the recitals running through the whole instrument show that no other advances and contributions could have been contemplated, and yet the court admitted this testimony of Gregg & Moss tending to show that a private debt from Kellogg & Moss to Gregg was included by the latter in this agreement.

In Allen v. Furbish, 4 Gray, 504, parol evidence was

held inadmissible to prove that the consideration of a note payable absolutely, was the sale of a horse on condition that the purchaser might, if disposed, return him in three months, and that he so offered. This case reviews many on the same point and all to the same effect.

In an action on a written agreement, in which the defendants acknowledge that they had received of the plaintiff certain chattels attached by him as sheriff, and promised to redeliver them in case they shall be wanted to satisfy an execution. Held, not competent to defendants to show by parol proof that plaintiff in order to induce them to sign the receipt, promised that upon notice of their being dissatisfied, he would receive the chattels again and discharge the defendants from their liability, and that he did not fulfill his engagement, and in consequence they were prevented from fulfilling theirs.

Wakefield v. Stedman. 12 Pick., 562.
Curtis v. Wakefield, 15 Pick., 438.

Admitting Harding and Moss' testimony on this point to be true, it does not prove any agreement between Gregg on one hand and Moss and Kellogg on the other to find this sum of $10,000; neither of them say that either Moss or Kellogg insisted on such finding, or that Gregg agreed with them to fund it. They were the only parties interested, that is, Gregg on one part as lender, and Kellogg and Moss on the other as borrowers. Whether the debt was funded or not, the new firm could not have been made to pay it, nor could its assets have been disturbed by the default in its payment. No judgment that

Gregg might have recovered for this claim against Moss or Kellogg, could have affected the firm of Moss, Harding & Co., or even their interest in that firm until its firm debts were paid, so that Harding could have had none other than a friendly interest in procuring Gregg to fund this debt, even if it was the same $10,000 referred to.

On this part of the defense the court instructed the jury as follows:

"Nor is it material whether the plaintiff afterwards "included this amount in his statement of advances to "the old firm or not. It is enough if you shall be "satisfied that he agreed to do so. Granting that Kellogg "& Moss were liable to make it good to him in December, "1857, still if Gregg agreed that the sum for which they "were so liable should be carried over to his capital stock "with Kellogg, Moss & Co., then the agreement is binding "on the plaintiff, because this sum had already clearly "been put into the affairs of the firm, and either the "plaintiff or Kellogg & Moss were entitled to have it "charged up as part of the assets furnished and sunk in "the past business of the firm."

To this part of the charge the plaintiff excepted, and we insist that in the reading the error is apparent. Admitting that the agreement, if carried out, might have relieved Moss & Kellogg from individual liability, it does not follow that a promise by Gregg to Harding would have that effect. If Gregg did in fact agree with Moss and Kellogg to fund this claim as part of his charges against the old firm of Kellogg, Moss & Co.,

and that agreement was upon a valid consideration, it might, in case he did not so fund it, have been a good ground for Kellogg or Moss to have applied to a court of equity to compel him to so fund it, and thus relieve them from the obligation they had incurred to him by the letter of Dec. 23, 1856, and the Chancellor would, if a proper case had been made, have compelled this funding; but it does not follow that this promise on Gregg's part, made to Gen. Harding, a third party, if never carried into effect by Kellogg or Moss, is to deprive Gregg of all redress under the terms of the letter. If Gregg did not, in fact, receive anything for this money from the funding, and did not place it in his account under that agreement, and Moss and Kellogg knew that he did not, we cannot see how he has thereby discharged Moss from his liability, and yet the court told the jury that such was the effect of the alleged promise on Gregg's part.

43 The court further says on this point in its charge: "If "they (Kellogg and Moss) had understood their liability "still existed on this letter, they might have taken action "themselves to have had the claims provided for and "funded to their credit among the accounts of the old "firm."

This was excepted to because it assumed and told the jury by inference that Kellogg and Moss never did receive any credit for their advance from the assets of the old firm. There is no evidence to show that they did not receive such credit, but on the contrary the strongest presumption that they took care of their own interests to

that extent. It was not incumbent on the plaintiff to show that Moss or Kellogg had funded this sum in their accounts, and as the defendant had the whole control of the books and papers of both firms, Kellogg, Moss & Co., and Moss, Harding & Co., if this item had not been included in Kellogg & Moss' funding account, he would naturally have made proof of that fact.

The court also, in support of this "funding theory," instructed the jury, subject to our exception, as follows:

41 "It was an advance to meet an indebtedness of the firm, "to protect its commercial honor, and although Kellogg "& Moss may have made themselves personally liable to "pay the money within 60 days to Gregg, yet Gregg was "at liberty to deem the firm also liable for it, especially "if not paid within 60 days. If they made default, did "not make payment, or cause it to be paid within 60 days, "he might say that, having gone to increase the assets of "the firm, the firm was liable, as well as Kellogg and "Moss, for the payment of the money. *Gregg had his "election to hold the firm, as well as Kellogg & Moss, to "consider it as capital put with the firm by himself.*"

We deny that any such right of equitable subrogation existed in Gregg unless by a new contract. Gregg had refused to put any more money into the firm, and they had no right to call on him for more. This money was advanced on the individual credit of Moss and Kellogg (which credit was a substantial reality, as both Gregg and Moss testify to Moss's individual wealth aside from his partnership embarrassments connected with this railroad).

Being advanced to them on their private credit, if they used it for the benefit of the firm of Kellogg, Moss & Co., it would seem that they, and not Gregg, were the proper parties to receive credit from the firm. In equity, Gregg might have obtained a decree subrogating himself to the rights of Kellogg & Moss against the firm for this sum, but as the claim stands now, it is an individual matter between Gregg on one part, and Moss on the other.

Suppose Kellogg & Moss had had a claim against Gregg, is there any doubt of their right to set-off as against this claim?

We claim that Gregg could not have made any valid bargain, one that would be binding on either party, to hold this claim against the firm unless by agreement with some member of that firm. Harding was not a member, and had no power to act for it. Therefore, any agreement between him & Gregg was not binding, either on Gregg or the firm, and the actual members of the firm do not seem to have acquiesced in any such agreement.

The facts in this whole case are strongly with the plaintiff, as is shown by the two verdicts he received; and we believe, with the errors corrected and the law rightly applied, he will maintain the action on every trial.

OBADIAH JACKSON,
For Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

December Term, A. D. 1871.

RICHARD GREGG,
Plaintiff in Error.

vs.

WILLIAM S. MOSS,
Defendant in Error.

No. 185.

POINTS FOR DEFENDANT IN ERROR.

Printed by the CHICAGO LEGAL NEWS Company, 15 North Jefferson St.

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Supreme Court of the United States.

DECEMBER TERM, 1871.

RICHARD GREGG
v.
WILLIAM S. MOSS.

POINTS FOR DEFENDANT IN ERROR.

This is a suit by one co-partner against another for the return of money paid to the financial agent of the co-partnership and applied to protect the commercial honor of both parties by paying a peculiarly sacred debt of that co-partnership. It is brought eleven years after the co-partnership had been dissolved, seven years after the plaintiff had settled and got his money out of that co-partnership, and seven years after the defendant had changed his residence to California, nine years after the death of the

co-contractor of the defendant, and nearly twelve after the debt had been incurred.

The five years required to bar the claim by the statute of limitations of the State of Illinois, where both parties resided from 1856 to 1861, had nearly run (less than six months being unexpired) when the defendant went to California to reside, the plaintiff bidding him good-bye, and parting with him without a word uttered of a claim against him, but with expressions of gratitude, fervently acknowledging his great obligations to defendant for saving his money advanced to the same co-partnership. Dep. of W. H. Buttrick, p. 33 Record.

Seven years later, having heard a false story that defendant had made money out of the co-partnership affairs, and finding an old and forgotten letter, giving color to his present suit, among the papers in his garret, he sues the defendant, returned on a visit from California, still admitting that it was their common co-partnership debt which the company, and not the defendant personally, ought to pay.

The plaintiff is the only living witness of the transaction out of which the claim springs, having waited until death has sealed the lips of the party with whom he did the business, and until fire has destroyed, or forgetfulness, accident, or otherwise, have cancelled every written evidence to shed light upon it.

The case was tried twice in the absence of the defendant, and the defense was peculiarly difficult, because the plaintiff continually shifted the ground of his claim, and time had destroyed or cancelled nearly all other information bearing upon the matter. Courts seeing the enormity of the claim, have freely given the new trials required by the plain dictates of justice, and after a full and fair trial upon the merits, such evidence was found that a verdict was rendered for the defendant.

It is not true that this verdict was rendered under instructions of the court in any other sense than every verdict is rendered in other cases, or the other verdicts were rendered in this. Nor is it true that a motion for a new trial was overruled "*pro forma.*"

I.

The first point which the plaintiff makes, is, that the court erred in excluding evidence of the statements of William Kellogg, made on December, 23, 1856, and after the alleged transaction, to the effect that "*he had received the money from Gregg, and fixed Elder (the creditor) off, and Elder had gone home.*"

The most conclusive answer that we have to this, is, that the exclusion of this testimony did the plaintiff no harm; for it was not denied that Gregg let Kellogg have the means to pay Elder.

On the contrary, the defendant in his testimony (p. 28) of record says: "Kellogg did not pretend to deny that Gregg had paid this $10,000 to him, when I went to see him about it. I can't deny that Gregg had advanced $10,000 in some way for Elder, because I only know what they told me."

Again he says (p. 27): "I knew Elder was in town, from what Mr. Kellogg said. That's the only way I knew. I don't know whether they ever raised the money. I don't know that it was ever paid, any further than what Mr. Gregg told me. * * * I never heard any more about that debt, until Mr. Gregg came to me, and said that he had these drafts to pay, and that he could not spare it out of his business, and, that he wished I would go and see Kellogg. I did not understand that this was an advance to the company on the part of Gregg. I understood that he lent them to the company for the benefit of himself and every member of the concern."

Again (p. 22): "I recollect that Mr. Gregg spoke to me in the year 1857, on one or more occasions, about this Elder affair; I think it was in the latter part of June, Mr. Gregg came to me, and asked me to go and see Mr. Kellogg about $10,000 that he had loaned him in drafts, and had had to pay, and wanted Kellogg, as the financier of the company, to pay that back to him. I went and saw Mr. Kellogg, and he told me that he had no funds of the company in his hands; and said further, 'I have advanced large amounts to the company, and so have

you, and Mr. Gregg is no better than you or I, and he will have to put that money in, and more with it, or we all go down.' Those were the exact words. I went back and told Mr. Gregg precisely the words. Gregg said he thought it was very hard that he had to pay those drafts in St. Louis. Mr. Ewing, his commission merchant there, had stopped it out of his sales of high-wines, and he could not spare it out of his business. I understood him to say he let Kellogg have the drafts for Mr. Elder. I think he said two drafts. I never heard any intimation that he let Kellogg have one dollar in money, until I heard it on the trial. He did not make any claim against me at the interview in June, 1857, nor speak of the letter."

Of this same transaction, Gregg speaks (p. 16), in which he says: "I either gave Kellogg a draft of my own, or accepted his draft in thirty or forty days."

Again (p. 17): "I knew that it was paper I gave, in some shape, though I have no idea what it was. I know the money was raised in my name. * I have no recollection what paper; don't remember that it was a draft that he (Kellogg) drew upon me. I know my name must have been upon the paper in some shape." "I have only a general recollection that it was local paper; I remember that I gave something of the kind, but I don't remember what it was; I get at the amount from memory." Of the conversation Gregg speaks (p. 18), "I called on Moss dur-

ing 1857, some six times, and talked with him about the Elder matter; I have no recollection as to the time of the year I first called on him; couldn't say how far apart the different calls were. I had spoken to Capt. Moss about the return of this money. He told me he would go and see Kellogg about it, and try to get it. He came back, and said that Kellogg said he couldn't do any thing; that my money was in there, and it was no better than theirs, and I think the expression was 'By God, they wouldn't pay it!' or something of that kind."

It is obvious that Gregg is not talking about money only, but an advance in part at least of drafts, and that Moss and he are talking about the same thing.

The very defense that the debt was funded under the agreement of December 1, 1857, and the conversations in which it was talked of and claimed as a debt against the firm testified to by Moss and Harding, both show that it was no part of the defendant's case to dispute that Elder was paid off with means got of Gregg.

But the next answer is that the admissions of Kellogg, made after the transaction, and not as part of the "*res gestæ*," are not evidence against his co-contractor, Moss, on the familiar principle that his agency was then functus officio.

1st Greenleaf Ev., Sec. 113.
Whiteside vs. Margarel, 51 Ill., 508.
Story on Agency, Sec. 134–137.

And again, if it be claimed that it is the admission of a joint promisor, we answer that such admission should not be received to establish a fact required to make the parties jointly liable; even if such admission be admissible in any event and for any purpose, which we also deny.

The declarations of Kellogg were offered in this case for the purpose of showing a fact creating a joint liability between him and Moss, which should be established before the authorities quoted by appellant could be applicable on the ground of the statement being an *admission*.

II.

The second error assigned is that the parol testimony of the claims of Gregg in regard to this transaction, made at and before the making of the agreement of Dec. 1, 1857, was not admissible in evidence.

Why not? The plaintiff says because thereby it is sought to vary the written agreement.

This is a simple misapprehension of the object and effect of that testimony.

That was to show that Gregg then claimed this advance of Dec. 23d, 1856, as a debt against Kellogg, Moss & Co.

This he had a right to do; but he seeks to show that it

was only a debt of Kellogg & Moss to him, and not also a debt of the company.

The truth is, that when the agent of the copartnership went to him to get money to pay a copartnership debt, and he let that agent have that money, and the debt was paid, he had a right to look to the copartnership for the return of the money.

And this evidence of what he said, is simply for the purpose of showing the light in which Gregg and Moss and copartners viewed this advance of Dec. 23, 1856, and rebut the pretense of the plaintiff that he never did hold it a company debt.

This evidence shows that the transaction was in fact a loan to the company.

Again, as a question of estoppel, it is important to show that he said he would fund it; this leaves the agreement to stand and to operate upon the debt; because he ought to have funded it, and was only himself in fault if he did not; and rebuts the argument or inference drawn, if it be conceded that he did not in fact put it in his account, which, by the way, is not true, as the evidence outside of Mr. Gregg clearly shows, as we shall show hereafter.

How is the charge erroneous?

Is it not clear that by the agreement of Dec. 1st, 1857,

all "cash paid and advancements made" to the firm were to become capital stock? Was not this sum, paid to and applied by the financial agent of the firm to pay Elder, "cash paid to the firm?"

It was applied for by the agent of the company, received by the agent of the company, and paid out by the agent of the company.

That he may have had the right also to hold Kellogg & Moss individually as principals, as well as jointly as copartners with many others, does not change his right to look also to the firm.

The agreement to fund this debt referred to in the charge is not by parol, but the written agreement of Dec. 1, 1857.

The parol evidence was admissible to show the matters embraced in it, as the copartners making it understood, the state of facts touching this matter which then existed.

But that part of the charge that says "that Kellogg & Moss if they had understood their liability might have taken action to have had their claims proved and funded to their credit among the accounts of the old firm," is objected to because it "assumed and told the jury by inference that Kellogg & Moss never did receive any credit for their advance from the assets of the old firm," whereas it is said there is no evidence they did

not, but a presumption that they took care of their own interests to that extent, "and besides, defendant had the whole control of the books and papers."

Now this is scarcely worth answering; for the court does not say as he might that these men did not receive credit; and there is no proof that defendant had at the trial more control of the books and papers of the co-partnership than his co-partner, the plaintiff.

Indeed, from the testimony of Clark, it is obvious the plaintiff did have access to the books, for he himself did produce the books of the firm on the trial.

But there is evidence that the books show no credit to Kellogg or to Moss for the payment to Elder. Clark says, p. 20:

"I don't see any item of any credit in Dec., 1856, to Mr. Kellogg for $7,500 paid to Mr. Elder." * * * "I have just examined the journal and ledger of Kellogg, Moss & Co. for the month of Dec., and found no evidence that Kellogg had paid anything to the firm; I did not see anything that Moss or Kellogg or Gregg had furnished funds to the firm to pay off Elder, Dec. 23d, or any date about that time."

Capt. Moss, too, in his testimony, shows that he could not have taken credit for any money advanced or liability assumed, as he swears he did not know what the transaction was except by the statements of Gregg and Kellogg,

and did not expect to incur any liability in the matter, but thought Kellogg was to take care of it (p. 27.) Kellogg, too, appears from Gregg's own account of the reply sent to him by Moss, understood the indebtedness to be Gregg's, and that he would have to put it in and more too, as in fact Gregg did.

Hence it was literally true that one of the consequences of Gregg's lying in wait with this old letter, would be that Moss would, if he paid the money, probably lose it, as Kellogg was long dead and the firm was sold out and closed up, having been dissolved many years.

The next point consists of an exception to the charge of the court that Gregg could, if he chose, look to the co-partnership for repayment as well as to Moss & Kellogg; this is challenged, because it is claimed this payment was made on the individual credit of Kellogg & Moss.

Unlikely as it is that Gregg preferred to trust two persons instead of the same persons and four other persons beside, as he swears; yet it is to be remembered that the circumstances speak for themselves, and the fact that he subsequently treated the debt as a firm debt, and demanded it of the firm, and when the agreement of Dec. 1, 1857, was to be made, at first refused to join in it, because he could not in justice to himself put in this debt, as he assumed it would be, if he signed it as it stood, a debt of the firm as he then held.

Then there is the fact that Moss & Kellogg are said to have become insolvent in October, 1857, and the firm certainly went on and was not so insolvent, for Gregg told Buttrick they were able to pay the partners back a part of their money, for which he was grateful to Moss.

Then, too, there is another fact that needs comment under another head, viz., that Gregg in fact did declare that this debt was put in the firm, both to Moss, as Moss swears, and in his own deposition in 1860 as that shows.

Look at this for a moment, for it disposes of the case and fairly contradicts Gregg, and proves on one point that he trusted the firm and treated the debt as one of the firm, and on the other point proves that he actually funded it.

These two points are most material, and as conclusive evidence exists of one at least of them, the attention of the court is especially called to them.

Then, to the first question, How much did Gregg fund?

Let him answer, p. 36, record: "I say that the claims I brought forward to be funded covered all the claims I supposed I had against Kellogg, Moss & Co., except some bonds. The aggregate amount was $95,700; interest, $9,600; principal, $85,000. The road owed me also about $10,000 for bonds, principal and interest. They owe me that to-day. My vouchers were filed in the railroad office the day the account was filed on the 1st of March, 1857."

Now listen to Capt. Moss, p. 40: "He (Gregg) told me that he put into the concern from $95,000 to $98,000 without the interest. He told me that some time after it was funded. I did not see a statement that he had made in writing at that time."

But though we could fairly claim that after agreeing to fund this debt, and then declaring that he had funded it, or evidence at least equal to the unaided testimony of the plaintiff to this effect, though we could fairly claim that the plaintiff had failed in making sufficient proof of his story, and we had proved to the contrary; yet this is not all.

We then call up an old deposition of Mr. Gregg himself, which contains the truth as he saw it, in October, 1860, much nearer the transaction.

He is then asked (p. 39): How much did you put into the firm of Kellogg, Moss & Co?

He answers: "I can't answer exactly, but it was about one hundred thousand dollars; I had vouchers for $95,000 or $98,000, without counting interest."

He is then asked: Was the amount you put in the firm paid in cash or how otherwise?

Ans. All cash, I believe.

He is then asked: Have you ever put anything into

either of said firms beside what you have mentioned in your previous answer?

Ans. I have not; I have loaned the company seven mortgage bonds, for which they are indebted to me; "I hold the company's note for $1,476.94 besides."

Now here we have, when the statements of Gregg on the stand are put together with those of his deposition of 1860, the most satisfactory proof that Moss is right, and that he did fund this Elder debt, and did in fact put it into the firm.

Note carefully. He now swears on the stand that he funded all his claims against Kellogg, Moss & Co., amounting to $85,000 of principal, exclusive of interest. In his deposition of '60, he swore that he had put into the firm in cash, exclusive of interest and bonds, "about $100,000. I had vouchers for $95,000 or $98,000, without counting interest."

In short, add the $10,000 Elder debt to the amount he now says he funded and you make his statements all agree, and prove that he funded that debt as he agreed to, —funded $95,000 or $98,000, as he told Capt. Moss; put into the concern $95,000 or $98,000, as he swore in 1860.

The truth is, after twelve years his memory became treacherous, and furnished him the false facts which convinced him that the old and forgotten letter was a just claim against his old comrade.

His testimony is a tissue of mistakes; it is founded upon a mistake; it is not even true that he refused to put more money into the firm, for we find him, who was bound to put in but $30,000, and who had, in December, 1856, but slightly increased it, we find him to have continued to put into the firm, whom he pretended he would not then trust, until his advances reach nearly $100,000.

Many misstatements are contained in the plaintiff's argument, which are, doubtless, unintentional; but lest they be regarded, we briefly note in answer to one or more of them, that this was a simple copartnership, with no attributes of a railroad corporation, and resembling it in no way except that it built a railroad.

All the questions covered by the charge of the Court were questions of fact, and were fairly submitted to the jury. With the present testimony no verdict for the plaintiff was possible; and none was ever had, or could be had, adverse to the defendant with such testimony.

At the bottom of the case is the difficult question whether the plaintiff had the right to sue at all at law for a sum of money applied to pay and got to pay a debt, to the payment of which he was bound to contribute, and to reimburse his co-partners if they in fact paid Elder.

Within the nice line which divides the cases where such suits at law can be brought, from those where they can not, the plaintiff meant to put this case; but under the cir-

cumstances neither court nor jury, when the facts were fully disclosed, were inclined to help him to revive this stale claim after lying by until he had disposed of his partnership interest, and the partnership had been dissolved, and the partners scattered over the continent.

Look for a moment at the letter on which the case is founded, and much is contained in it to warrant the view taken by defendant, that he never supposed that he was to become personally responsible by it; but it was a promise by the firm to return the money signed on behalf of the firm by their financial agent, Kellogg, and their Superintendent, Moss.

Gregg seems to have understood that it was to be returned by the firm when he asked Moss to see Kellogg, and get it back in June, 1857.

Kellogg's reply shows that he so understood the application as made to the firm, for he says, "Gregg's money is no better than ours; he must put it in, and more too."

And this Gregg did, for he continued to advance up to $95,000.

Gregg himself, in spite of his evident care, speaks of it as a "railroad debt," (p. 17,) and assigns as a reason why he did not draw for Kellogg that he had no authority to loan money to a railroad; but he there forgets what he says elsewhere that it was not a railroad debt, but a loan to the individuals, Moss and Kellogg.

He also says, he let it go on their "personal warrantee," (p. 35,) whatever that may be! Clearly, he means he let the company have it on their promise to see it paid back by that company.

Scrutinize the letter, and it will be seen that it is not a personal application but is a company call, and the signatures are the signatures of the company, by its agents.

The language is, that Elder "should not be forced to pay this money for our accommodation." Whose accommodation? The accommodation of the company — of Gregg, Moss, and all, as co-partners; for of all, Elder was the agent, and he had accepted for all.

In the next sentence the same personal pronoun is used, in the only phrase that imports any promise, viz: "If you will send us two drafts, * we will return you the money." Who is the "us" and "we," here? and why is not the same "company" meant here as is meant by the same pronoun in the former sentence? No good answer can be given, except in the affirmative; although such answer disposes of the case. What is meant by the closing sentence, "It must be done, as we cannot get along any other way"? Who cannot get along? Not Moss or Kellogg, as individuals, but the company, of which Gregg is a member; and he is not solicited to loan to them, but the language is, "*It must be done*," and means, to protect our common commercial honor. The letter is the promise of the company to refund this money,

and the fact is, that the financial difficulties so continued to increase that all parties were compelled to put in more money, including Gregg, and this promise was necessarily not performed, and formally abandoned, when new partners were brought in to save the wreck.

HARDING & McCOY,

Defendant's Attorneys.

No 185

Supreme Court of the United States.

RICHARD GREGG,
Plff. in Error,
vs.
WILLIAM S. MOSS,
Def't. in Error.

REPLY
OF
PLAINTIFF IN ERROR.

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The defendant's brief seems mostly devoted to a review of the facts in the case as regarded from his stand-point, and arguing therefrom, that even if errors in law have intervened, that substantial justice has been done.

I had always understood the rule of this Court to be, that it never reviewed the facts in a case, and did not base its decisions on the ground that they might have warranted a similar finding, even if the law had been wrongly applied. This style of treating a legal question obtains in some of our State courts; but the practice is undignified; and inasmuch as the rule of this court on that point is so often applied, I shall assume that if we have convinced your honors that grave errors have intervened in the exclusion of evidence proper to support our case, or in the instructions which the Court gave to the jury as to what the law was, that we are

entitled to a new trial based upon a correct application of the law as this Court shall declare it to be; but least any of the statements of fact made by defendant may tend to prejudice the Court, I will answer some of them very briefly.

Thus he says, this suit was brought seven years after the copartnership had been dissolved, and seven years after the defendant had changed his residence to California, &c. Now, the record shows that Moss went to California in 1861, at which time he was absolutely bankrupt. He testifies,(p.22) "I left Peoria in April, 1861 " and have since that time resided in California." It further appears that from the time Gregg loaned the money in question until Moss went to California, he, Moss, was becoming more and more embarrassed financially, and that when he went to California he was absolutely a bankrupt, there being large judgments against not only the firm of Moss, Harding & Co. but also against Moss individually, which he could not pay. See printed record, p. 36—38, where the transcripts of sundry judgments appear, all having executions returned, "no property found." It is true, Moss swears (p. 27), "I never had a judgment against me," but that is only in keeping with other of his reckless testimony, contradicted as it is in this instance by the records of the Peoria Circuit Court. It is a fit commentary on the character of the man, and the credibility to which his statements generally are entitled. At the time he made this extraordinary allegation in the United States Court in Chicago, that he never had any judgment against him, he probably imagined that no one would ever think of sending to Peoria for this transcript.

It further appears that this suit was commenced as soon as the plaintiff, Gregg, was able to get jurisdiction of Moss. Gregg says (p. 35), "I never saw him after that till March, 1868,—the month " in which I brought this suit."

From this it appears that Gregg was guilty of no laches whatever in bringing this suit, which was commenced within a month after he was first able to get jurisdiction of Moss' body, after the time when a judgment against him would have had any value.

Equally false and unfair is the statement in defendant's brief (p. 2), that "the plaintiff is the only living witness of the transac- "tion out of which the claim springs, having waited until death "has sealed the life of the party with whom he did business, and "until fire has destroyed, or forgetfulness, accident or otherwise, "have canceled every written evidence to shed light upon it."

Let us see how much truth there is in this mixture of eloquence and pathos:

Strike out the evidence of the plaintiff in toto, and I insist we have a good case. There is,

1st. The letter or order from Moss & Kellogg to Gregg, asking for the advance of $10,000 to pay Elder, the signature, &c., of which is not questioned.

2nd. This letter is found in Gregg's possession.

3rd. Moss himself admits that Kellogg left to take the letter to Gregg.

4th. Elder swears that he received at least $7,500 that day from Kellogg.

5th. Knowland offers to testify, but the Court excluded it, "that "only a few moments after Kellogg had obtained the $10,000 of "Gregg, he told the witness (Knowland) that he had received the "money from Gregg and had paid Elder off."

This makes out a perfect case without any word from Gregg, and we insist, looking at it as stated in the above order, is conclusive of the competency and importance of Knowland's evidence.

On page 7 of his brief, defendant says, "And again, if it be "claimed that it is the admission of a joint promisor, we answer "that such admission should not be received to establish a fact "required to make the parties jointly liable." "The declarations "of Kellogg were offered in this case for the purpose of showing "a fact creating a joint liability between him and Moss, *which "should be established before the authorities quoted by appellant could "be applicable on the ground* of the statement being an admission."

If we understand the very obscure proposition as above quoted from defendant's brief, it would seem that he claims that Knowland's statement of Kellogg's admissions to him were offered for the purpose of establishing by such admissions alone the existence of a joint contract on the part of Kellogg and Moss,—that is, the *creation* of a joint agreement or liability on the part of Moss with Kellogg,—whereas a review of record shows an entirely different purpose in the testimony. I admit that if there had been no written letter—no other testimony as to Moss' making the contract than Kellogs's verbal statement, not under oath, of the fact,—it would have been incompetent as hearsay. If Kellogg had stated that "Moss and I agreed that we would borrow $10,000 of Gregg "with which to pay Elder, and I have received the money from "Gregg and fixed Elder off," that would have been, as the defendant terms it, "creating a joint liability" by hearsay evidence, and of course incompetent; but no such attempt to *create* is sought. The joint liability is created by the letter signed by Kellogg and Moss and addressed to Gregg, wherein they say if he will send them the draft, &c., "we will return you the money before the "expiration of the sixty days." That letter, if Gregg granted its request, rendered Moss and Kellogg jointly liable. Moss admits its signature by himself, and that he gave it to Kellogg and directed him to show it to Gregg and get the drafts. Of course if the drafts were got the liability of Kellogg and Moss was fixed Now, the statement of Kellogg as offered was not the signing of the letter, or the agreeing to pay on the part of Moss, but that he received the drafts, or their proceeds, from Gregg in accordance with the instructions of the letter, and applied them likewise according to instructions, to fix Elder off. It is hard to conceive a statement more against interest than this so made by Kellogg, and to have required Kellogg to swear to it in order to make it pass for truth, would be equal to the practice, in some of the western courts, of requiring criminals who plead guilty to do it under the sanctity of an oath and at the same time to kiss the gospels.

"The rule in reference to admissions by one of several partners "or others having a joint interest in a particular subject is this:

" that such admissions in respect of that subject matter, made " while the partnership *or joint interest existed*, are evidence against " the rest."—*Hitt* v. *Allen*, 13 *Ill.*, 595.

The only case cited by the defendant in support of this point is *Whiteside* v. *Margaul*, 51 *Ill.*, 507. In that case, which was for work and labor alleged to have been done by plaintiff for defendant on a contract made with one Thomas Whiteside as agent for the defendant, a witness was permitted against objection to testify on behalf of the plaintiff to certain statements made to him by the agent Thomas Whiteside in respect to the matter in controversy when the defendant was not present, *and when the agent was not engaged in the business to which the controversy related.* Another witness was also allowed to testify to statements made to him by the agent Whiteside in relation to the authority of the latter to act as agent in connection with the matter in controversy. The statement of both of these conversations of the agent,the Supreme Court held to be incompetent to prove the facts stated. As to the first conversation the Court says: " The statements of an agent are " admissible only when they are part of the *res gestæ*, but in this " case they cannot be so regarded." And as to the latter testimony, " An agency cannot be proven by the mere statements of " the alleged agent."

The distinction between the case cited and that under argument is so plain that it is hardly worth comparing the two. The testimony offered and rejected was not to prove by the joint promisor Kellogg any agency on his part or anything that Moss the defendant and his co-promisor had said or done. So far as that goes we have proved it by the letter and by the testimony of other witnesses. What we sought to prove was, that what Kellogg and Moss required Gregg to do by the letter, he, Gregg, in fact did. We do not rest it on the ground of agency, nor as being part of the *res gestæ*, but because it was an admission made by Kellogg *against his interest* and in the direct line of the joint undertaking between him and Moss, and especially was it proper in this case as he was the only party connected with the business who could have known whether Gregg paid the money or not, and the only party, accord-

ing to the testimony of both sides, who would naturally have received the money if Gregg had paid it to any one.

In the case cited, the evidence held by the Court to be improper, was the verbal statement of a person, that he was the agent for another, and as such agent, had done certain acts. It was not a statement against his interest, and would have been absurdly oppressive to have been admitted to bind the person for whom he pretended to act. In our case, however, no doubt exists about the joint signature of the letter, and none can be entertained as to its meaning and construction, notwithstanding Capt. Moss says he did not intend to bind himself in signing it.

The texts cited from Greenleaf and Story on Agency, relate only to the admissibility of agents' statements after the business has been closed. Of course they are not admissible.

To our second point, that parol evidence was admitted to vary the terms of the written agreement, the defendant answers, that this was a partnership debt. This is not true, and the evidence of of Moss and Kellogg directly negative such a theory. If it was a partnership debt, why should there have been any controversey about funding it? The agreement provided that each member should make a statement of advances made to said firm, and that "the accounts so rendered and agreed upon should represent "the Capital Stock of each individual member in said firm." Now if this was a partnership debt why should any question arise as to whether or not it should be included? The agreement took care of it in that case and there was no need of any discussion as to that more than any one other item which any of the partners might claim in their accounts. The truth is and it is apparent from this testimony of Harding, that they knew then it was not a partnership debt, and it was so regarded by all of the parties, and it can not be possible that so skilled a business and professional man as General Harding would have allowed the agreement to remain as it was written if in fact this individual claim was to have been included.

In *Abrams* v. *Pomeroy*, 13 *Ill.*, 135, the plaintiff sued on a written guarantee made by the defendant, for the benefit of a son of

the defendant, wherein the defendant said, "That in order to es- "tablish a credit for my son James Abrams, that I will and do "hereby guarantee and become security for the payment of any "sum not exceeding $1,200 which he may owe Pomeroy & Co. "either by note or book account."

On the trial, the defendant introduced evidence to show that it was expressly understood between the plaintiff and the witness, that the guarantee was to cover subsequent purchases only. The Supreme Court (*Treat, C.J.*) says: "When parties reduce their "contract to writing, the law conclusively presumes that the whole "terms of their agreement are correctly expressed in the writing; "*and their conversations and declarations made before and at the time* "*of the execution of the written contract are rejected as wholly inad-* "*missible.*"

"The terms of the writing rendered him liable for the payment "of goods purchased prior to its date. The testimony excluded "such a construction of the contract. The writing embraced all "sales made after its date. The evidence excluded all sales made "before it was signed and delivered." The analogy to the present case is apparent, the written agreement provided that "each member of said firm shall make a statement of *cash paid* "*and advances made to said firm*," and yet Harding's parol testimony tended to show that without changing the wording of the pending agreement, it was agreed by parol that Gregg should put in other matter besides what he had advanced to said firm, to wit: this $10.000 loaned to Kellogg and Moss.

In *Lane* v. *Sharp*, 3 *Scam.*, 571, the defendant offered to prove, that before a certain written contract for the sale of some real estate was delivered, it was agreed between the defendant and the agent of the plaintiff, that if the land mentioned in the agreement should be redeemed by minor heirs within two years, the contract should be rescinded. This the Supreme Court held to be error, saying (p. 573): "All antecedent and contemporaneous verbal

" agreements are merged in the written contract. The law will " not allow that an agreement may rest partly in writing and " partly in parol: so that it is equally inadmissible to add to, take " from or specifically change the terms of a written agreement by " parol," &c.

See *Scott* v. *Bennett*, 3 *Gilm.*, 243.
Harlow v. *Boswell*, 15 *Ill.*, 56.
Wood v. *Price*, 46 *Ill.*, 440.

The defendant raises the question as to whether or not the plaintiff had the right to sue at law for a sum of money applied to pay a debt owing to several parties, of which he was one. To that we answer, it depends entirely on the contract—on the agreement of the parties. In this case it appears he refused to put any more money into the partnership—having already advanced more than his share—but he was willing to loan to William Kellogg and William S. Moss individually, but who were at that time aside from their connection with this partnership persons of great pecuniary responsibility and whatever may have been the understanding as to the purpose for which the money was to be used, it is certain the advancing of it by Gregg on that letter created a debt from Kellogg and Moss to him, and while under the terms of the letter and the statement made by Kellogg, he was nominally bound to use the funds to pay Elder, still there was no legal obligation on his part to do so, and the promise of Kellogg and Moss was as much binding on Gregg, whether they used the money for the purpose indicated in the letter or applied it to their own private business.

The Counsel mistakes the evidence when he says [p. 11,] that Gregg subsequently treated the debt as a firm debt and demanded it of the firm. The evidence of Moss and Gregg, both show that he repeatedly after it was due, demanded it from Moss and Kellogg; but not from any other member of the firm, and that he did not demand it from them as a firm debt, but as owing from

them individually to him, and it does not appear that they then treated it in any other light than as a debt from them to him. From whom else could he have demanded it, we would ask, but from these two ~~personifiers~~ promisors?

If Moss and Kellogg did not find their claim themselves, it was their own fault, and can not be brought up against Gregg more than any other laches they may have committed.

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